LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 30 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

EVENING NEWS ASSOCIATION and MARTIN S. HAYDEN,
Petitioners,

vs.

PATRICIA ARBER, et al,
Respondents.

No. 1016

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND APPENDIX

George E. Brand, Jr.
1881 First National Building
Detroit, Michigan 48226
963-8142
Attorney for Petitioners

Rockwell T. Gust
Frank G. Pollock
Butzel, Eaman, Long, Gust & Kennedy
1881 First National Building
Detroit, Michigan 48226
963-8142
Of Counsel

THE INLAND PRESS, DETROIT, MICHIGAN

INDEX

PETITION

	Page
Opinions And Orders Below	2
Jurisdiction	2
Questions Presented	3-5
Constitutional Provisions and Statutes Involved	5
Statement	6-11
Reasons Why The Writ Should Be Granted	12-18
Conclusion	19

APPENDICES

Appendix A — Constitutional Provisions and Statutes Involved	1a-4a
Constitution, Amendment I	1a
Constitution, Amendment XIV, Section 1	1a
Michigan General Court Rules, GCR 1963, 117, 116.4 and 116.6	5a-76a
Appendix B — Opinions And Orders Below	1a-4a
Opinion of the Circuit Court for the County of Wayne, Michigan	5a-44a
Supplemental Opinion of the Circuit Court	44aa-44aaa
Opinion of the Michigan Court of Appeals	45a-49a
Opinion of the Supreme Court of Michigan, September 3, 1969, including copies of affidavits appended by the Court	50a-75a
Engle Affidavit*	57a-59a
Hayden Affidavit	59a-60a

*** The Engle affidavit as appended by the Court omits Petitioners' newspaper article. It is printed in Appendix C, page 77a.**

Page

Order of Supreme Court of Michigan Denying Application for Rehearing 76a

Appendix C — Portions of the Record

"Detroit News" Newspaper Article of May 13, 1962 ..... 77a

"Detroit Free Press" Newspaper Article of May 13, 1962 ..... 78a

Petitioners' Motion For Summary Judgment* 79a-80a

Page 40 of Petitioners' brief on appeal to Supreme Court of Michigan 81a-82a

Petitioners' Application for Rehearing to Supreme Court of Michigan 83a-92a

* The supporting affidavits of Hayden and Engle are printed in Appendix B, pp. 57a-60a and the newspaper articles attached to Engle affidavit are printed in Appendix C, pp. 77a-78a.

CITATIONS

CASES:

Cerrito v. *Time, Inc.*, 302 F. Supp. 1071 (DC ND Cal. 1969) 13

Dombrowski v. *Pfister*, 380 U.S. 470 (1965) 13

Durant v. *Stahlin*, 374 Mich. 82, 130 N. W. 2d 910 (1964); 375 Mich. 628, 135 N. W. 2d 392 (1965); 375 Mich. 665, 135 N. W. 2d 407 (1965); 16 Mich. App. 192, 167 N. W. 2d 891 (1969), leave to appeal denied, 382 Mich. 762 (1969) 7, 17

Gilberg v. *Goffi*, 251 NYS 2d 823 (App. Div. NY 1964) aff'd per curiam, 260 NYS 2d 29 13

Greenbelt Cooperative Publishing Association, Inc., et al v. *Charles S. Bresler*, 253 Md. 324, 252 A. 2d 755 Cert. granted 24 L.Ed. 2d 133 ..... Page 14

Hurley v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (DC Minn. 1967), affirmed 398 F. 2d 346 (6th Cir. 1968) 13

Klahr v. *Winterble*, 4 Ariz. App. 158; 418 P. 2d 404 (Ct. App. 1966) 13

Mercantile Nat. Bank v. *Langdeau*, 371 U. S. 214 (1966) 14

Mills v. *State of Alabama*, 384 U. S. 214 (1966) 14

New York Times Co. v. *Sullivan*, 376 U. S. 254 (1964) 3, 9, 12, 15, 16

Rosenblatt v. *Baer*, 383 U. S. 75 (1966) 16

Shelley v. *Kraemer; McGhee* v. *Sipes*, 334 U. S. 1 (1947) 10

Speiser v. *Randall*, 357 U. S. 513 (1958) 9, 15

Tagawa v. *Maui Publishing Company*, 448 P. 2d 337 (Supt. Ct. Haw. 1968), cert. denied, ... U. S. .....; 38 L. W. 3127 13

Thompson v. *Evening Star Newspaper Company*, 394 F. 2d 774 (DC Cir. 1968) 13

Time v. *Hill*, 385 U. S. 374 (1967) 13, 15

Time, Inc. v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969), cert. denied, 395 U. S. 922 13

United Medical Laboratories v. *Columbia Broadcasting System*, 404 F. 2d 706 (9th Cir. 1968), cert. denied 394 U. S. 921 13

Walker v. *Pulitzer Publishing Company*, 394 F. 2d 800 (8th Cir. 1968) 13

Washington Post Co. v. *Keogh*, 365 F. 2d 965 (DC Cir. 1966), cert. denied 385 U. S. 1011 13

Wolfgram v. *Valkó*, 375 Mich. 421; 134 N. W. 2d 649 (1965) 16
Young v. *Groenendal*, 382 Mich. 456; 169 N. W. 2d 920 (1969) 15
Zimmerman v. *Stahlin*, 374 Mich. 93; 130 N. W. 2d 915 (1964) 7, 8, 17

UNITED STATES CONSTITUTION:

Amendment I 5
Amendment XIV, §I 5

MICHIGAN GENERAL COURT RULES:

GCR 117 5
GCR 116.4, 116.6 5

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

EVENING NEWS ASSOCIATION and MARTIN S. HAYDEN,
Petitioners,

vs.

PATRICIA ARBER, et al,
Respondents.

No._____

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND APPENDIX

Petitioners respectfully pray that a writ of certiorari be issued to review the September 3, 1969 judgment and opinion of the Supreme Court of the State of Michigan and its October 6, 1969 denial of rehearing.

Respondents herein are Patricia Arber, Allan B. Clink, Gerald A. Plas, Palmer T. Heenan and Karl Lady who are plaintiffs in five substantially identical libel actions in which Petitioners are defendants, George M. Zimmerman who is plaintiff in a sixth action in which Petitioners are not defendants but which was consolidated below, and John H. Stahlin and Paul D. Bagwell who were co-defendants in the six actions and who are filing a separate petition for certiorari.

OPINIONS AND ORDERS BELOW

The opinions of the Circuit Court for the County of Wayne, Michigan granting Petitioners' motion for summary judgment have not been reported. They are printed in Appendix B to this petition (pp. 5a-44a, 44aa, 44aaa). The opinion of the Michigan Court of Appeals affirming the decision of the Circuit Court is reported at 10 Mich. App. 181 and 159 N. W. 2d 154. It is printed in Appendix B (pp. 45a-49a). The opinion and judgment of the Michigan Supreme Court reversing the Courts below is reported at 382 Mich. 300 and 170 N. W. 2d 45. It is printed in Appendix B (pp. 50a-75a). The order of the Michigan Supreme Court denying Petitioners' application for rehearing is printed in Appendix B (p. 76a).

JURISDICTION

The decision of the Michigan Supreme Court reversing the Michigan Court of Appeals' affirmance of summary judgments was entered on September 3, 1969. Petitioners filed a timely application for rehearing on September 22, 1969; it was denied on October 6, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The petitioning newspaper and its Editor admittedly published a newspaper report that a prominent candidate had filed a Complaint with the Michigan Fair Campaign Practices Commission and charged seven "extremist" political groups with improper electioneering in an attempted "takeover" of the local Republican organization. Five libel actions were brought by individual members of two of the political groups. Summary judgment was granted by the trial court and affirmed by the Michigan Court of Appeals upon the uncontroverted showing that: (1) Petitioners had published without knowedge of falsity and in reliance upon the integrity of the candidate and the specific assurance by his representative that the charges could be substantiated and (2) that Petitioners' newspaper article in no way referred to the individual plaintiffs and was not actionably "of and concerning" them.

The Michigan Supreme Court reversed. It refused to determine whether Petitioners' speech was free or could be regulated by a state accorded civil action for libel. It refused to determine whether the publication was constitutionally "of and concerning" the individual plaintiffs. It held the *Times*[1] privilege inapplicable on the grounds that the news reported was not "hot news" but required "close scrutiny" and "careful verification" before publication and that the plaintiff members of the political groups were not "public officials" or "public persons". It further held that the *Times* privilege could only be determined by a jury, that a jury would be warranted in finding *Times* malice by reason of Petitioners' political

---

[1] *New York Times* v. *Sullivan*, 376 U.S. 254.

opposition to plaintiffs' candidate and Petitioners' "hurried publication" without "careful verification" and that inasmuch as malice had been alleged summary judgment was not available and the actions were to be continued through jury verdicts.

Petitioners' Application for Rehearing on the grounds that the Supreme Court decision itself deprived them of their First and Fourteenth Amendment rights was denied without opinion, one Justice dissenting.

The questions presented are:

1. Whether the First and Fourteenth Amendments to the Constitution of the United States require that Michigan apply the *Times* standard in libel actions brought against a public newspaper and its Editor as to their accurate newspaper reporting of matters of political controversy, or whether application may be avoided on any of the following grounds:

   (a) That Michigan cannot draw the fine line between free and regulable speech,

   (b) That plaintiffs are not public officials or public persons,

   (c) That the newspaper or its Editor may have been politically opposed to the candidate supported by plaintiffs,

   (d) That the news reported was not hot news and was not closely scrutinized and carefully verified?

2. Whether the First and Fourteenth Amendments permit a state to accord such libel actions to individual members of large political groups who were not in any way named, described or identified in the newspaper report involved, much less charged with personal involvement in the charges of political misconduct reported?

3. Whether in any event the First and Fourteenth Amendments permit a state to direct that such libel actions be continued through jury verdict solely because plaintiffs have alleged *Times* malice?

4. Whether the Fourteenth Amendment requires that Michigan uniformly accord Petitioners the benefits of its summary judgment procedure, including those benefits previously accorded their co-defendant in these same actions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Amendment I and Amendment XIV, Section 1 to the United States Constitution and Michigan's General Court Rules GCR 1963, 117, 116.4 and 116.6. Said Amendments and Rules are printed in Appendix A (pp. 1a-4a).

STATEMENT

Petitioners are a public newspaper and its Editor. During the 1962 political controversy between liberal and conservative factions as to control of the Michigan Republican Party Petitioners admittedly published a newspaper article accurately reporting that a State Senator who was a Republican candidate for Lieutenant Governor had filed a Complaint with the Michigan Fair Campaign Practices Commission alleging an attempted "takeover" of the local Republican organization by "certain extremist groups" through improper electioneering practices. The article reported that the Complaint named seven groups: the John Birch Society, the American Nazi Party, Sons of America, Independent American Party, Durant's Rebels, Republican Voters Associated and Young Americans For Freedom; it reported some of the charges made and reported the response and countercharge of the candidate supported by the groups. The accuracy of the article is not disputed. The article did *not* name or describe any of the individual plaintiffs. It and the Detroit Free Press article are printed in Appendix C (77a-78a).

In 1963 by substantially identical unverified Complaints the individual plaintiffs brought the five libel actions here

involved.[2] Each plaintiff alleged he was a member of one of the large political groups charged, was "active politically", and that he had been libeled with the intent "to drive him out of political activity" and to interfere with his "right to be active in politics". Defendants included the newspaper, its Editor, the candidate and heads of the Party. Plaintiffs' actions did *not* charge inaccuracy in Petitioners' reporting. The actions asserted that the charges made in the Complaint filed with Michigan Commission were false and that their publication was motivated by political opposition (R pp. 9a-34a).[2a]

In 1965 the Michigan Supreme Court affirmed Summary Judgment granted to one of the defendants on the basis of his undisputed affidavit.[3]

---

[2] A total of seven actions were filed and are pending. The one by the groups' candidate (*Durant* v. *Stahlin*, 374 Mich. 82, 130 N. W. 2d 910 (1964); 375 Mich. 628, 135 N. W. 2d 392 (1965); 375 Mich. 665, 135 N. W. 2d 407 (1965) and 16 Mich. App. 192, 167 N. W. 2d 891 (1969)) is not involved herein. One, *Zimmerman* v. *Stahlin et el* was involved in the proceedings below but Petitioners are not defendants therein. Of the five actions involved in this petition (Arber, Clink, Plas, Heenan and Lady) the petitioning newspaper is a defendant in all and its Editor Martin Hayden is a defendant in two (Clink and Heenan). Other defendants in the five were the Michigan Senator and candidate for Lieutenant Governor John H. Stahlin, his press representative Charles A. Ferry, the head of the Michigan Republican Party Paul D. Bagwell, a party leader Carl McKeehan, and Wayne County Republican Chairman Norman Stockmeyer. Ferry was defaulted in 1965 and summary judgment in favor of McKeehan was affirmed by the Michigan Supreme Court in 1965 (*Zimmerman* v. *Stahlin*, 374 Mich. 93; 130 N. W. 2d 915). Summary judgment as to Stockmeyer was reversed by the Michigan Court of Appeals and he was not party to the Michigan Supreme Court proceedings. Stahlin and Bagwell are filing a separate petition for certiorari.

[2a] "R" references are to record below. "App." references are to appendices to this petition.

[3] *Zimmerman* v. *Stahlin* (six cases), 374 Mich. 93; 130 N. W. 2d 915.

In 1966 Petitioners moved for Summary Judgment on two grounds: (1) That Petitioners' newspaper report and the underlying Complaint were privileged under the First and Fourteenth Amendments to the Constitution of the United States and (2) that Petitioners' newspaper report was not "of and concerning" the individual plaintiffs as a matter of law (App. C, pp. 79a-80a). Petitioners' motion was based on both the affidavit of its Editor and the affidavit of its reporter who was not a party. The affidavits established that Petitioners had published only their attached newspaper report and that they had published it without knowledge of falsity and in reliance upon the integrity of the candidate and specific assurance by the candidate's representative that the charges contained in the Complaint could be substantiated (App. B, pp. 57a-60a and App. C, p. 79a-80a). Plaintiffs only showing in opposition was to file the affidavit of the candidate's representative (App. B, pp. 66a-75a). His affidavit not only did *not* dispute Petitioners' lack of knowledge of falsity and reliance upon his representations but it added that the charges were believed to be true by him, by the candidate, by Petitioners' reporter, and by "nearly every facet" of Party leadership (App. B, pp. 70a, 72a).[4]

Summary judgment was granted by the trial court (App. B, pp. 5a-44a) and affirmed by the Michigan Court of Appeals (App. B, pp. 45a-49a) on the ground of *Times* privilege and also on the ground that the newspaper report was not "of and concerning" the individual plaintiffs.

---

[4] The affidavits also undisputedly established that the Michigan Fair Campaign Practices Commission conducted an investigation in response to the Complaint and that the political groups to which the individual plaintiffs belonged were national in scope and had hundreds of members. (App. B, pp. 57a-60a).

On September 3, 1969 the Supreme Court of Michigan reversed (App. B, pp. 50a-75a). Although its attention was specifically directed to the constitutional aspects of the matter (App. C. pp. 81a-82a), it completely ignored and said nothing as to the "of and concerning" ground of the decisions below. Citing *Times* and *Speiser* v. *Randall*,[5] it held it could not "draw the fine line between speech unconditionally guaranteed and speech which may legitimately be regulated". Treating lack of malice as an affirmative defense rather than recognizing that publication with malice is a constitutionally required element of any permissible plaintiffs' claim, it not only refused to determine that the state could not constitutionally accord or continue the actions where plaintiffs had no proof of malice, but it directed that the actions be continued through jury verdict. It held the *Times* privilege inapplicable on the ground that the news was not "hot news" but "rather the type of news which by its very nature requires close scrutiny and careful verification". It held the *Times* privilege limited to "public officials" and "public persons" and inapplicable despite the political controversy involved and plaintiffs having bottomed their actions on their admitted political activity and group memberships. It held that plaintiffs' mere allegations of malice inexorably required jury trial on the ground that proof of lack of malice turns on the credibility of the defendant publisher. It specifically held that the jury would be warranted in finding *Times* malice because of Petitioners' political opposition to plaintiffs' candidate and Petitioners' "hurried publication" without "close scrutiny and careful verification" of the facts underlying the charges made in the Complaint.

[5] *New York Times* v. *Sullivan*, 376 U.S. 254. *Speiser* v. *Randall*, 357 U.S. 513.

On September 22, 1969 Petitioners filed an Application for Rehearing (App. C, pp. 83a-92a) on the grounds that the Michigan Supreme Court's decision itself deprived them of their rights under the First and Fourteenth Amendments[6] by: refusing to determine that their publication was privileged and unactionable and directing that they be subjected to the regulating and censoring effect of jury trials; refusing to apply the *Times* privilege to the political controversy involved and imposing the duty of "close scrutiny and careful verification"; holding that absence of *Times* malice could only be determined by the jury and the jury could predicate such malice on political opposition without "careful verification"; subjecting Petitioners to continuance of the litigation when it undisputedly appeared that Petitioners had in fact published without knowledge of falsity and in specific reliance upon the sponsor of the Complaint and his representative; holding that plaintiff was entitled to go to the jury without evidence of *Times* malice but solely on Petitioners' credibility and the hope that the jury might disbelieve them; incorrectly asserting that the federal authorities had "consistently" refused to grant summary judgment under *Times;* refusing to determine that Petitioners' newspaper article was not "of and concerning" the individual plaintiffs, much less with constitutionally required clarity; patently misstating the contents of the documents before the Court; and refusing to uniformly accord Petitioners the rights accorded by the Michigan summary judgment rule, including the rights previously accorded their co-defendant in these same cases.

---

[6] *Shelley* v. *Kramer; McGhee* v. *Sipes*, 334 U.S. 1 (1947).

On October 6, 1969 Petitioners' Application for Rehearing was denied without opinion, one Justice dissenting (App. A, p. 76a).

Petitioners initially raised their federal constitutional rights under the First and Fourteenth Amendments in their motion for summary judgment, asserting that their newspaper report and the underlying Complaint were constitutionally privileged and that the report was not "of and concerning" the plaintiffs (App. C, pp. 79a-80a). Summary judgment was granted and affirmed by the Michigan Court of Appeals on both grounds (App. B, pp. 5a-44a and 45a-49a). In reversing, the Supreme Court of Michigan rejected Petitioners' constitutional claims of privilege and in effect determined that Petitioners' report was constitutionally "of and concerning" plaintiffs (App. B, pp. 50a-75a and App. C, p. 77a). In their Application for Rehearing Petitioners reasserted their said constitutional rights and further asserted that the decision of the Court had itself denied Petitioners their First and Fourteenth Amendment rights by directing that the action be continued, depriving Petitioners of their constitutional privilege, refusing to determine that their report was not constitutionally "of and concerning" plaintiffs and denying Petitioners the equal protection of the Michigan Summary Judgment procedure (App. C, pp. 83a-92a).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Whether the First Amendment prohibits a state from directing the continuance and jury determination of civil actions in libel in the face of such undisputed facts as shown by trial would require reversal of any verdict under *Times* has not been squarely decided by this Court. Nor has this Court squarely determined the constitutional necessity that a state not arbitrarily deprive a defendant of use of the state's summary judgment procedure to become relieved of the continuing burden of actions prohibited by *Times*. Such determinations can only be made in a case the posture of the instant case, to-wit where the constitutional prohibition has been seasonably raised, there is no dispute as to lack of *Times* malice, summary disposition has been accorded but withdrawn and the state has unequivocally directed that a mere unverified allegation of malice inexorably requires that defendant be subjected to full jury trial.

The Michigan Court says that the decisions of this Court and their application by the lower federal courts *preclude* summary judgment as to lack of *Times* malice (Opinion p. 9 and footnote 4; App. B. pp. 55a-56a). That *Times* malice, once incanted by mere allegation, irretrievably sentences defendant to full trial regardless of the facts. That *Times* is not a prohibition against state action but is a mandate that defendant submit to the full censoring effect of state accorded litigation. That *Times* is a new sword in the hands of the libel plaintiff, not a shield protective of free speech.

To the contrary, most federal and state courts[7] interpret this Court's decisions as constitutionally *requiring* summary judgment with respect to publications that are clearly unactionable under the First Amendment in order to prevent the chilling, harrassing, regulating and self-censoring effects of protracted litigation proscribed by *Dombrowski*, *Times* and *Time* v. *Hill*.[8]

Only this Court can resolve the conflicting interpretations of its decisions and, as amply illustrated herein, prompt resolution is critically required if *Times* is not to be purely illusory and is to afford any practical protection, particularly to the public press. A newspaper has no First Amendment protection of any practical value if, as Michigan now says, when it publishes political controversy it may have a privilege if sued by a "public figure" but has none if sued by one of his supporters; that if the plaintiff merely *alleges* malice the newspaper must in every instance stand full trial and can only prevail if it can convince the jury that its publication was not motivated by political op-

---

[7] *Washington Post Co.* v. *Keogh*, 365 F. 2d 965 (D.C. Cir. 1966); cert. denied 385 U.S. 1011, reversing a failure to grant summary judgment. *Thompson* v. *Evening Star Newspaper Company*, 394 F. 2d 774 (D.C. Cir. 1968); *Walker* v. *Pulitzer Publishing Company*, 394 F. 2d 800 (8th Cir. 1968); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D.C. Minn. 1967); affirmed 398 F. 2d 346. *United Medical Laboratories* v. *Columbia Broadcasting Sys.*, 404 F. 2d 706 (9th Cir. 1968); cert. denied 394 U.S. 921. *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969); cert. denied, 395 U.S. 922, reversing a failure to grant summary judgment. *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (DC ND Cal. 1969). *Gilberg* v. *Goffi*, 251 NYS 2d 823 (App. Div. NY 1964), aff'd per curiam 260 NYS 2d 29, reversing a failure to grant summary judgment and pointing out the anomaly of precluding suit by a candidate but allowing suit by his law partner. *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (Ct. App. 1966), *Tagawa* v. *Maui Publishing Company*, 448 P. 2d 337 (Sup. Ct. Ha. 1968), cert. denied .... U.S. ...., 38 L. W. 3127,

[8] *Dombrowski* v. *Pfister*, 380 U.S. 479 at 487; *New York Times* v. *Sullivan*, 376 U.S. 254 at 278; *Time* v. *Hill*, 385 U.S. 374 at 389.

position, was not hurried, was closely scrutinized and was carefully verified. The practical effect of the Michigan decision is that, constitutional rights notwithstanding, when Petitioners publicized political controversy they did so upon pain of wholesale litigation, unterminable other than by jury verdicts, and the probability of adverse verdicts based on political opposition, hurried publication and lack of verification. As a practical matter the instant decision is "final",[9] both in emasculating Petitioners' First Amendment rights and in directing that the litigation be continued and that the proscribed censoring effects be thereby imposed. Petitioners admittedly published their newspaper report of the charges made in the Complaint in reliance upon the sponsor of the Complaint and the specific assurance of his representative that the charges could be substantiated, not upon Petitioners' independent "careful verification" of the facts underlying the charges; the Michigan Court has determined that Petitioners had no privilege to so publish under these circumstances.

2. In *Greenbelt*[9a] this Court has before it a less flagrant evasion of *Times* with respect to newspaper reporting of matters of public interest and concern. Therein the trial court at least purported to apply *Times*, albeit by instructions that permitted the jury to evade it; herein, the Michigan Supreme Court defies *Times* and directs the trial court to proceed accordingly. Under the Michigan decision a newspaper can only report charges of political misconduct if it is prepared to prove that the charges were not hurriedly published, were closely scrutinized, were carefully

---

[9] e.g. *Mills* v. *State of Alabama*, 384 U.S. 214 (1966); *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555 (1963).

[9a] *Greenbelt Cooperative Publishing Association, Inc., et al* v. *Charles S. Bresler*, 253 MD 324, 252 A. 2d 755, certiorari granted October 20, 1969———U.S.———, 24 L. Ed 2d, 133.

verified and further, and regardless of the accuracy and fairness of the report itself, that neither the newspaper nor its Editor had exercised or were exercising their own right to be politically active in opposition to the affected politician or his supporters.

The means by which the Michigan Court accomplishes this result are equally defiant of *Times*. *Times* is not to be uniformly applied but is to be applied only to "hot news". Disregarding the repeated explanation that the First Amendment privilege arises out of the public's paramount right to be fully informed on matters of legitimate public interest and concern, and particularly upon pending political controversy, the Michigan Court says that privilege hinges upon the nature of the plaintiff not the occasion for and the nature of the publication, that *Times* can be avoided by merely having any *unnamed* member of an affected political group become the named plaintiff. Michigan simply deprives Petitioners of the fundamental protection set forth in *Times* and *Time* v. *Hill*.[10] Moreover, citing and defying both *Times* and *Speiser* v. *Randall*[11] (App. B, p. 54a), Michigan converts malice from a constitutionally required element of any permissible claim into a mere affirmative defense on which it holds that a defendant cannot sustain his burden of proof by undisputed and unimpeached affidavit, by such a deposition or even by such testimony in open court, only by jury verdict. See Opinion (App. B, p. 56a) and compare *Young* v. *Groenendal*, 382 Mich. 456 and 464; 169 N. W. 2d 920 at 923-

[10] *New York Times* v. *Sullivan*, 376 U.S. 254 at 269-273, noting that robust political discussion is a political duty and lies at heart of of the field of free debate. *Time v. Hill*, 385 U.S. 374 at 388 noting that privilege applies not only to public affairs but to all maters of legitimate public interest; that the interest of the public is the basis of the privilege.

[11] *Speiser* v. *Randall*, 357 U.S. 513.

4 and *Wolfgram* v. *Valko*, 375 Mich. 421 at 434-5; 134 N. W. 2d 649 at 654. In fine, if a plaintiff merely alleges malice a publisher may prevail only by jury verdict (App. B, p. 56a)

3. Although both the trial and the appellate courts squarely held that Petitioners' report was not "of and concerning" any of the individual plaintiffs and although Petitioners squarely directed the attention of the Michigan Supreme Court to the constitutional necessity that it be so to be actionable as a matter of constitutional law, the Michigan Court refused to determine that it was not and itself directed that plaintiffs' actions proceed through verdict (App. B, pp. 34a and 46a; App. C, pp. 81a-82a and p. 87a).

Petitioners' newspaper report (App. C, p. 77a) undisputedly did not refer to any of the individual plaintiffs, much less accuse them of "personal involvement in the acts in question".[12] Petitioners reported charges as to seven political groups; even the two to which plaintiffs belonged each had hundreds of members (App. B, pp. 59a and 60a). Patently, Petitioners' report is constitutionally unactionable by these individual plaintiffs. Yet what the Michigan Court has done *sub silentio* is to hold that plaintiffs may sue as the persons personally charged with the improperly attempted take over of the Republican organization but that notwithstanding plaintiffs are not such public figures as to render *Times* applicable. Unless Petitioners accused plaintiffs of "personal involvement" in the acts of political misconduct Petitioners' article is constitutionally unactionable by plaintiffs; if Petitioners did, plaintiffs are not "virtual anonymities" and the *Times* standard must be applied.

4. The Michigan Summary Judgment Rules and procedure are substantially the same as the federal (App. A,

[12] *New York Times* v. *Sullivan*, 376 U.S. 254 at 288-9. See also *Rosenblatt* v. *Baer*, 383 U.S. 75 at 79-83 and 98-100.

pp. 1a-3a). Neither except First Amendment deficiencies in plaintiffs' claims or bar summary judgments on defendants' undisputed affidavits, much less when defendants' affidavits are confirmed by the affidavit of a nondefendant and by the only affidavit filed by plaintiffs. Moreover, prior to the filing of Petitioners' motion herein the Michigan Supreme Court had already granted summary judgment to one of Petitioners' co-defendants solely on his own undisputed affidavit and had held that the occasion for the publication was a political controversy, "At the most * * * a common interest and desire on the part of the several defendants * * * in ridding the Republican party of Durant's power or influence"; further, that a motion for summary judgment placed upon *plaintiffs* the burden of showing that they in fact had a claim upon which relief can be granted; "The plaintiff's affidavits must contain verification of all the material fact needed to establish a prima facia case."; "Judgment shall be rendered forthwith * * * if the affidavits or other proof show that there is no genuine issue of fact".[13]

Patently, Petitioners have been deprived of due process and denied equal protection. Not only did plaintiffs fail to verify that they had prima facia cases that were constitutionally permissible, but the affidavits undisputedly showed that Petitioners had published without knowledge of falsity and in reliance upon the integrity of the candidate who sponsored the charges and the specific assurance by his representative that the charges could be substantiated. Moreover, as noted by both the trial court

[13] *Zimmerman v. Stahlin* (six cases), 374 Mich. 93 at 99, 97 and 96. See, also, the Michigan Supreme Court's very recent refusal to review other summary judgments granted in *Durant* v. *Stahlin*, 382 Mich. 762 (1969) as to 16 Mich. App. 192, 167 N. W. 2d 891 (1969).

and the Court of Appeals, the only affidavit or other showing in opposition filed by plaintiffs not only created no issue but itself confirmed that the publication was of matters believed to be true by all involved, including Petitioners' own reporter (App. B, pp. 70a, 72a). Notwithstanding, as to Petitioners' constitutional privilege the Michigan Court has established a special classification which arbitrarily and unreasonably deprives Petitioners of all recourse to the summary judgment procedure. As to Petitioners, plaintiff is not required to produce "verification of all the material facts needed to establish a prima facia case". Instead, plaintiff is entitled to jury trial whenever "actual malice * * * * is alleged in any of the pleadings" (App. B, p. 56a). Summary judgment is unavailable regardless of whether the affiidavits show any genuine issue of fact. Petitioners' affidavits are inherently insufficient; Petitioners' credibility must in any event be submitted to the jury. If, as submitted, the majority of the state and federal courts correctly interpret and apply the decisions of this Court and freedom from the self-censoring effect of protracted litigation and the threat thereof is the heart of the First Amendment privilege, the decision of the Michigan Court is doubly offensive to Petitioners' constitutional rights.

CONCLUSION

For the reasons stated, it is earnestly submitted that a writ of certiorari should issue, particularly for consideration with *Greenbelt*.

Respectfully submitted,
George E. Brand, Jr.
1881 First National Building
Detroit, Michigan 48226

Rockwell T. Gust
Frank G. Pollock
Butzel, Eaman, Long, Gust & Kennedy
1881 First National Building
Detroit, Michigan 48226
OF COUNSEL

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan General Court Rules, GCR 1963.

Rule 117 Motion for Summary Judgment.

.1 When Available. A party seeking to recover upon a claim, counter-claim, cross-claim, or third-party claim may move with or without supporting affidavits for a summary judgment in his favor on all or any part of such claim at any time after the adverse party responds thereto by filing a pleading or motion. A party against whom a claim, counter-claim, cross-claim, or third-party claim is asserted may move with or without supporting affidavits for a summary

judgment in his favor on all or any part of such claim at any time.

.2 Grounds. The motion for summary judgment shall state that the moving party is entitled to judgment in his favor because of any 1 of the following grounds:

(1) The opposing party has failed to state a claim upon which relief can be granted,

(2) the opposing party has failed to state a valid defense to the claim asserted against him,

(3) that except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is therefore entitled to judgment as a matter of law.

.3 Motion and Proceedings Thereon. A motion based upon sub-rule 117.2(3) shall be supported by affidavits, and the opposing party prior to the day of hearing may serve opposing affidavits. The affidavits submitted by either party shall be governed by the provisions of sub-rules 116.4, 116.5, and 116.6. Such affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties shall be considered by the court at the hearing. Each party shall be given opportunity to amend his pleadings as provided by Rule 118 unless the evidence then before the court shows amendment would not be justified. Judgment shall be rendered forthwith if the pleadings show that any party is entitled to judgment as a matter of law or if the affidavits or other proof show that there is no genuine issue of fact. If it appears that the opposing party rather than the moving party is entitled to judgment, the court may render summary judgment in his favor without necessity of a motion therefor.

.4 Case Not Fully Adjudicated on Motion. If an application for summary judgment is denied or if the judgment rendered does not dispose of the entire action or grant all of the relief demanded, the court shall fix the time for further pleading or amendment, if any is necessary. By examining the evidence before it and by interrogating counsel, the court shall ascertain what material facts are without substantial controversy, including the extent to which the amount of damages or other relief is not in dispute, and such facts will be deemed established for all purposes in the action. In lieu of such order the court may treat the hearing and any continuations thereof as a conference under Rule 301, at the conclusion of which the judge shall prepare a summary of results specifically covering each of the items stated in 301.

Rule 116 Accelerated Judgment.

.4 Form of Affidavits. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the pleading or motion. Such affidavits shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts contained therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto unless such papers or copies thereof have been filed in the action, or are matters of public record in the county in which the action is pending, or are in the possession of the adverse party and are so stated in the pleading or motion or are of such nature that attaching them would be unreasonable or impracticable and is so stated in the pleading or motion together with reasons therefore.

.6 When Affidavits are Unavailable. Either party may

state in his affidavit that he cannot present the material facts essential to justify his position because such facts are known only to persons whose affidavits he cannot procure.

The affidavit shall name such persons and state why their testimony cannot be procured, together with a belief and reasons therefor as to the nature of their probable testimony. Thereupon the court may make such order as may be just, either denying the motion or ordering a continuance to permit the affidavit to be supported by further affidavits to be obtained, or depositions to be taken, or answers to interrogatories to be furnished, or discovery to be had.

APPENDIX B

OPINION AND ORDERS BELOW
OPINION OF THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, MICHIGAN

[Filed December 29, 1966]

At a session of said Court, held in the City-County Building, Detroit, Michigan, on the 28th day of December, A.D. 1966.

Present: Hon. Joseph G. Rashid, Circuit Judge.

Presently before this Court are eight cases for libel brought by ten individual plaintiffs against several and various defendants. In seven of such cases, some of the defendants have moved this Court for summary judgment under General Court Rule 117. These cases are as follows: Zimmerman v. Stahlin, et al., No. 6267; Plas v. Stahlin, et al., No. 6428; Heenan v. Stahlin, et al., No. 6429; Arber v. Stahlin, et al., No. 6431; Lady v. Stahlin, et al., No. 6432; Clink v. Stahlin, et al., No. 6486; and, Robbins, et al., v. Stahlin, et al., No. 6525.

One case, arising out of this same transaction, i.e., Richard Durant, plaintiff, v. John H. Stahlin, et al., cause No. 328-488, is not under consideration at this writing, no such motion having been filed by any of the defendants in that case, except defendant Stockmeyer.

In five of the cases, the Evening News Association and Martin S. Hayden, are named defendants (Martin Hayden is in only two cases). These cases are as follows: Plas v. Stahlin, et al., No. 6428; Heenan v. Stahlin, et al., No. 6429; McDonnell v. Stahlin, et al., No. 6430; Arber v. Stahlin, et al., No. 6431; Lady v. Stahlin, et al., No. 6432 and Clink v. Stahlin, et al., No. 6486.

Defendant, Evening News Association, hereinafter re-

ferred to as the News, and Martin S. Hayden, move for summary judgment under Rule 117.2 (1), alleging that the opposing party has failed to state a claim upon which relief can be granted.

In all of these cases, plus that of George M. Zimmerman, plaintiff, Civil Action No. 6267, defendants John H. Stahlin, Paul Bagwell and defendant Norman Stockmeyer, seek summary judgment in accordance with Rule 117.2 (3), claiming that except as to the amount of damages, there is no genuine issue as to any material fact, and therefore, are entitled to judgments as a matter of law.

Defendant Norman Stockmeyer moves for summary judgment, as did defendants News and Martin Hayden, pursuant to Rule 117.2 (1), claiming that the plaintiff has failed to state a claim upon which relief can be granted. It is to be noted here, however, that defendant Stockmeyer moved for summary judgment in Durant, plaintiff, v. Stahlin, et al., civil action 328-488. That motion is not to be decided at this writing.

The complaints in these actions, were filed in May of 1963, and in the main, contain identical or at least similar allegations. It is contended upon the part of the plaintiffs that the defendants herein, acting in association, jointly and severally, with malice, evil and ill will, and intending to ruin plaintiffs' good name and reputation, and particularly drive them out of political activity, published a certain eight page document marked "Exhibit A".

Plaintiff, in each case, contends that defendants, unlawfully and maliciously, charged the said plaintiff with certain infamous illegal unpatriotic criminal acts and offenses, and alleges further that the said defendants knew the same to be false, but calculated and intended to do the

plaintiff in each case harm and injury.

The plaintiff in each case further alleges that the defendants, jointly and severally, with malice, evil and ill will, and intending to ruin plaintiff's good name and reputation, and particularly drive him out of political activity, not only published the offensive document, but with malice, did cause copies of the same to be sent to the Michigan Election Fair Practices Commission, and in fact, to each individual member of the Commission.

The plaintiff in each instance also charges that the defendants furnished copies of the said libelous document to the Metropolitan Newspapers of Detroit, namely, the Detroit News and the Detroit Free Press. The remaining portions of each complaint describes the document in detail, making specific reference to its contents. "Exhibit A" is attached to each complaint. For purposes of clarity and an orderly presentation, this Court will pass upon the motions filed by defendants News and Martin S. Hayden first.

Martin Hayden is defendant in two cases: Heenan, 6429 and Clink, 6486, only.

The sole question presented by defendants News and Hayden is whether or not plaintiffs in these causes have asserted a cause of action in the complaints as filed.

Since the filing of these actions in 1963, the United States Supreme Court, the Michigan Supreme Court and other courts throughout the country, have rendered decisions and opinions which have recast the law of libel and defamation.

It is urged by defendants News and Martin Hayden that the publication was privileged as a matter of law. In the light of these recent opinions and decisions, this Court will examine these complaints to ascertain whether,

as a matter of law, plaintiffs herein have, by way of such complaint, established a cause of action.

It may be noted that defendants News and Hayden do not urge absolute privilege, but rather a qualified privilege, so-called.

Absolute privilege is confined to cases in which the public service or the administration of justice requires complete immunity from being called to account for language used. It applies more directly to matter of public concern, such as language used in legislative, judicial and executive proceedings. A communication absolutely privileged, as for example, are words spoken by a judge in his judicial capacity in a court of justice. A report or statement is rendered privileged by a member of the legislature. Such words or reports are not actionable, though made maliciously.

A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to certain other persons to whom he makes such communication in the performance of duty, or where the person is so situated that it becomes right in the interest of society that he should tell third persons certain facts which he in good faith proceeds to do.

It has been well established in the law of this state and of the United States that it is for the Court to determine whether a qualified privilege exists as a matter of law. This is not a fact question. Accordingly, the court must examine all of the circumstances and the allegations in plaintiff's complaint to ascertain whether or not defendants News and Hayden were protected in the alleged publication by reason of the asserted privilege (Lawrence v. Fox, 357

Mich. 134; New York Times v. Sullivan, 376 U.S. 254; 11 L. Ed. 2d 686).

Justice Smith of the Michigan Supreme Court, in Lawrence v. Fox, 357 Mich. 134, at page 139 discusses the question of privilege as follows:

> "Considerations of social policy similar in principle, but of lesser intensity, result in a privilege not absolutely but conditional, or, as sometimes put, qualified, or defeasible. These situations are of great variety, * * *. A publication is privileged when it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. These are the occasions in which one has not an absolute but a limited immunity to speak or publish words in and of themselves defamatory. What circumstances then, present this occasion of qualified privilege?
>
> "These are not new to our Court * * *", writes Justice Smith.
>
> "In Boserman v. Detroit Free Press, 287 Mich. 443, we described the term 'occasion' as meaning the 'extrinsic' situation presented. In that case, as the Court pointed out 'the extrinsic circumstances' in the instant case are that defendant's Newspaper was reporting a judicial proceeding. Likewise, in Westerhouse v. DeWitt, 215 Mich. 295, we approved an instruction defining the occasion as a meeting of the elders of a church, called to consider, investigate and adjust the differences between its members. *The term 'occasion' then refers to time, place and people.* Was it a testimonial dinner or a gathering in a saloon?

> Was it a trial at law, legislative debate, or a brawl in the alley? At this point we are looking at the *stage*, not the *script*. * * *
>
> "In making the determination as to privilege of the occasion, the *malice charged by plaintiff is not considered*. We held in Westerhouse that the question of privilege is to be determined by the occasion and not the language used. In Garn v. Lockhard, 108 Mich. 196, quoting an earlier case, we held similarly that the occasion determines the question of privilege. The language is only proper to be considered in connection with the question of malice."

* * * * *

What was the occasion and what were the circumstances? Notably, it is a matter of common knowledge which this Court can with propriety take judicial notice, but also heard undisputed testimony that the occasion involved was a political controversy over the control of the Republican Party in Wayne County in a gubernatorial election year of their respective positions in the Fourteenth Congressional Districts and other areas in Wayne County. As noted by Mr. Justice Adams of the Michigan Supreme Court, in VanDeusen v. Elliott, Romney, et al.,

> "All that appears to have been established was that Mr. Bagwell and others participated in a series of meetings among political leaders whose purpose was to find new leadership and there is nothing illegal about that."

Pleadings, brief and affidavits (hereinafter referred to) bear out that there was organized concern with respect to the demeanor and/or the philosophies, political and otherwise, of some members of the Republican Party.

The pleadings and the record further establish that Senator John H. Stahlin, then a candidate on the Republican ticket for lieutenant governor, requested the chairman of the Michigan Fair Campaign Practices Commission to conduct a full scale investigation into the activities of certain extremist groups in connection with the forthcoming Republican primary election in Wayne County. Senator Stahlin then transmitted to the commission "Enclosure A".

In "Exhibit A", he made allegations that charged certain Republican Party actives with improper practices, and concluded with the following summary,

> "I have assumed the responsibility of bringing this matter to the attention of the Fair Campaign Practices Commission for two reasons:
>
> (1) I am a member of the Republican Party and this movement poses a great threat to the integrity of the Republican Party;
>
> (2) I am a candidate for state office and the success of this movement would seriously endanger the Republican Party's prospect in the 1962 election. In addition, as an American citizen, I am outraged by such an anti-American conspiracy. I submit these disclosures to your Commission in complete confidence that you will take all necessary and proper actions in protecting the public interest. (Signed), Respectfully, John H. Stahlin."

It is not disputed that "Exhibit A" and the accompanying letter were delivered not only to all members of the Michigan Fair Campaign Practices Commission, but also delivered for publication to the Defendant Detroit News, the editor of which is defendant, Martin Hayden.

It is to be noted that the Fair Election Practices Com-

mission was first developed in 1952. Its membership is appointed by the governor and its purposes generally were to air, discuss and explore what might be termed unethical election practices. It holds hearings, discusses the complaints with the various candidates, and indeed, seeks to obtain pledges from candidates that they will subscribe to the highest norms of political campaigning. It can cover a wide and almost limitless range of political activity. By its own words, it selected to give major emphasis to instances of racial and religious bigotry and to such obvious violations of decency in campaigning as were "too flagrant to be ignored."

The alleged "Exhibit A", admittedly was publicized by Defendant News on May 13, 1962. It is elementary, in the opinion of this Court, that when the publication was delivered to the Detroit News, it could have chosen to publish same or disregard it. It is likewise recognized that all news media assume a responsibility, particularly in campaign years, to disclose all pertinent facts relative to the doings of political candidates, partisan and non-partisan. News media has, what this Court chooses to term, a quasi-public responsibility to make such disclosures in the interest of proper dissemination of all of the facts as they relate not only to actual candidates whose names will appear on the ballot, but the person who either support such candidates or those who may direct or control the party machinery, in a partisan election.

It is a generally known fact, too, that news media, in the assumption of their public responsibility, publicize all matters called to their attention and believed by them to be important enough to disclose to the public. Indeed, news media, from time to time, adopt editorial policies and views on political issues which may be accepted or repudiated by

the public. Nevertheless, it is the prime object and responsibility of these media to publish matters of public concern and interest. While some may differ, and critically take issue with the editorial policy or philosophy of any given newspaper, it is well within its quasi-public province to disseminate such information, facts, news items or editorials, in keeping with the best traditions of American free speech and free press. These notions are not new. They find their roots in our constitutional concepts of free press and free speech.

As indicated supra, since the commencement of these actions, a series of cases throughout the country following New York Times v. Sullivan, have transformed many principles of the law of libel and slander. In the New York Times case, the following principles were clearly declared:

> "(1) The ancient doctrine that the constitution does not protect libelous publications may no longer be utilized where its application would serve to impose sanctions upon criticism of the official conduct of public officers;
>
> (2) Expressions of grievance and protest on a public issue do not lose their constitutional protection by reason of a combination of falsity of factual statement and of defamatory content;
>
> (3) Public officials, like judges, are expected to be men of fortitude, unassailed by half-truths, misinformation, charges of gross incompetence, disregard of public interest, Communist sympathy, hints of bribery, embezzlement and the like, *especially when such charges are hurled in the heat of a political campaign;*
>
> (4) In cases involving criticism of public officials,

a new principle of qualified privilege in the law of libel is to be applied, namely, 'the constitutional guarantees require, we thing, a Federal Rule that prohibits a public official from recovering damages for defamatory falsehoods relating to his official conduct unless he proves that the statement was made with actual malice — that is with knowledge that it was false or with utter or with reckless disregard of whether it was false or not';

(5) This new principle is to be tested by the facts of each particular case in order to ascertain whether the alleged libelous statements were prompted by actual malice;

(6) On weighing the evidence, the Court is to avoid such result as might suggest that prosecutions for libel on government have any place in the American system of jurisprudence.

(7) The Court is likewise to avoid the thwarting of the free expression of impersonal attack on government by investing the remarks with a personal significance.''

Thus, because of the occasion and the pronouncement of New York Times v. Sullivan, Lawrence v. Fox and similar holdings throughout the country, this Court concludes as a matter of law that the publication by defendants News and Martin Hayden was privileged.

The next question presented to this Court is whether or not the qualified privilege has been abused. The qualified privilege raises a presumption which like all presumption in the law may be rebutted. It may be removed by abuse of the privilege of bad faith, actual malice or excessive publication.

In the case of public officials, actual malice must be alleged and proven. Malice in fact means ill will against a person and implies a desire and intention to injure. Thus a publisher may not be held liable for statements he honestly believes to be true and published in good faith (see Mundy v. Hoard, 216 Mich. 478; Fortney v. Steffen, 237 Mich. 603; Smith v. Smith, 73 Mich. 445; Buffalino v. Maxon, 368 Mich. 152). This definition has been modified by Times v. Sullivan and other recent decisions.

Plaintiffs' pleadings do not allege excessive publication, nor do they allege bad faith. The pleadings do, however, allege malice, ill will and an intent to injure. Thus, the query immediately arises in the light of recent opinions and decisions, the circumstances of the alleged publication, do plaintiffs' complaint allege a cause of action against defendants News or Martin Hayden?

The Michigan Court, in Robbins v. Evening News Association, 373 Mich. 589, held that a wide latitude is given to a writer or speaker in expressing opinions in regard to one who becomes a candidate for public office. This rule has been recognized in Michigan for many years. This same latitude was expressed by the Michigan Court in Smurthwaite v. News Publishing Company, 134 Mich. 377, wherein the Court said as follows:

> "These publications were discussions of the matters involved in the election and of the fitness of the candidates for the offices for which they sought election. A good deal of latitude must be allowed to newspapers and individuals in discussions of this character."

More significant and telling are the pronouncements of Times v. Sullivan (1964, 376 U.S. 254):

"The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, and opportunity essential to the security of the republic is a fundamental principle of our constitutional system. It is a prize American privilege to speak one's mind, *although not always with perfect good taste on all public institutions.*

"Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

"In the realm of religious faith and in that of political belief, sharp differences arise. In both fields, *the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been or are prominent in church or state and even to false statements.* But, the people of this nation have ordained, in the light of history that in spite of the probability of *excesses and abuses,* these liberties are in the long view essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

"That erroneous statement is inevitable and in free debate and that it must be protected if the freedom of expressions are to have the breathing space that

they need to survive, NAACP v. Button, 371 U.S. 415, was also recognized by the Court of Appeals for the District of Columbia in Sweeney v. Patterson, 76 APP. D.C. 23; 128 Fed. 2d 457."

In that last mentioned opinion, Judge Edgerton spoke for unanimous Court which affirmed dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. Said the learned judge, "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize the governors. The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion but information. Political conduct and views which some *respectable people approve and others condemn are constantly imputed to congressmen. Errors of fact, particularly in regard to a man's mental state and processes are inevitable. Whatever is added to the field of libel is taken from the field of free debate.*"

"Injury to official reputation," said the Supreme Court in Sullivan, "affords no more warrant for repressing speech that would otherwise be free than does factual error, even though the utterance contains half-truths and misinformation (Pennykamp v. Florida, 328 U.S. 321). "Criminal contempt of criticism of a judge or his decision, for instance, is not justified."

Equally strong and clear is the following language in Times v. Sullivan:

> "*A rule compelling the critic of official conduct to guarantee the truth of all of its factual assertions* and to do so on pain of libel judgments virtually un-

limited in amount, leads to a comparable self-censorship. Allowance of the defense of truth, with a burden of proving it on defendant, does not mean that only false speech will be deterred."

"Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true because of doubt whether it can be proved in court for fear of the expense of having to do so * * * *. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

With the foregoing pronouncements in mind, it is necessary to examine pleadings and affidavits to ascertain whether or not plaintiffs herein have met the test as announced in Sullivan.

Where the occasion is privileged because of public interest as in the within causes, there can be no cause of action for libel. At least, absent constitutionally clear proof and allegations that the defendant knew the publication false, or published it in reckless disregard of its truth or falsity.

The majority of the Court in New York Times decision held that where the occasion is privileged by reason of the public interest involved, the constitutional guarantees of freedom of speech and freedom of press preclude any action for libel unless it is clearly established that the publication was made with actual malice — that is with knowledge that it was false, or with reckless disregard of whether it was false or not. The privilege is not lost by reason of falsity of the statements made, damage to the plaintiff's reputation, or both. Hence, this Court must be

convinced before the privilege is lost that the Constitutional standard is met, namely, defendants' knowledge of falsity, or reckless disregard of truth or falsity.

It might be noted in passing that three members of the United States Supreme Court in concurring opinions, were of the view that discussion of public officers in public affairs must be absolutely privileged. However, in the absence of such a ruling by a majority of that Court or the Michigan Supreme Court, this Court cannot so hold.

Plaintiffs herein allege that the matter published by the Detroit News was published with knowledge of its falsity, and secondly, that the same was published with ill will and maliciously. Plaintiffs' complaint contends that the publication of the so-called offensive document was done wilfully, deliberately, corruptly and with malice aforethought, with the intent and purpose of injuring plaintiffs. Nowhere in plaintiffs' complaint is there an allegation that the publication by Defendant News was done with reckless disregard of whether it was false or not.

This Court is of the opinion that plaintiffs' complaint does not allege any facts relating to any extrinsic circumstances from which the existence of actual malice is inferrable. The only claim of actual malice is a conclusion without allegation of fact and a general allegation that the writing and its publications were done maliciously is insufficient. (See Nuyen v. Slater, 372 Mich. 654, on page 659.)

Absent allegations of fact that defendants News and/or Martin Hayden knew of the falsity of the document or that it was published with reckless disregard of whether it was false or not, plaintiffs do not state a cause of action consistent with, and as required by the constitutional test

announced in Times v. Sullivan. In Nuyen v. Slater, the Supreme Court sustained a granting of a summary judgment, dismissing plaintiff's complaint. As indicated, if the publisher honestly believed the publication to be true, and published it in good faith, he cannot be held libelous for statements so made.

This Court should not permit dishonesty of purpose to be lightly inferred from acts which are as consistent with good faith as with bad faith. As said in Raymond v. Croll, 233 Mich. 268, and reiterated in Nuyen v. Slater, if the circumstances relied on showing malice are as consistent with its non-existence as with its existence, the plaintiff has not overcome the presumption of good faith and there is nothing for the jury.

It was once held in Owen v. Dewey, 107 Mich. 67, that a publisher's reasonable belief in the truth of the publication made, or probable cause for belief in truth or good faith belief in truth, would not relieve him of responsibility for libel, but this case was obviously overruled in later cases and has not been cited to this point in the last fifty years (see Lawrence v. Fox, 357 Mich. 134).

Thus, the source of the publisher's information becomes important. If the source of the publisher's information is a person or organization of probity and good repute, the jury would have warrant to find that what he honestly believed what he published was the truth and thus, that his qualified privilege was not abused.

On the other hand, if his source were notably mandatious, there might well be warrant to find otherwise. For this reason, evidence bearing upon the source of the publisher's information is not only relevant, but crucial to the question of the protection of the qualified privilege. However, the

constitutionally defined test of actual malice laid down in Times does not contemplate that the defendant believed the statements to be true, nor that he had actual knowledge of their truth, nor that he have good faith belief of their truth, but rather proof that the statement was made with knowledge that it was false or was reckless disregard of whether it was false or not.

The privilege is not lost by a showing that the defendant was merely negligent. It need be emphasized here that the definition of malice, as set forth in the Times case and subsequent opinions, is not keyed to ordinary care, but there must be a reckless disregard for truth.

In Rosenblatt v. Baer, 86 Supreme Court 659, (1966), the Supreme Court re-emphasized the Constitutional limitation on libel actions, and at page 676 said as follows:

> "The thrust of New York Times is that when interest in public discussions are particularly strong as they are in that case, the constitution limits the protections afforded by the law of defamation."

In Rosenblatt v. Baer, supra, the Supreme Court cited with approval the New York case of Gilberg v. Goffi, 251 N.Y.S., 2d. 823, affirmed, 260 N. Y. S. 2d 29; 207 N. E. 2d. 620 (1965).

In that case, a summary judgment was granted to a defendant who made a political speech, which was distributed earlier to the press for publication, charging that:

> "We read in the papers of the charges that the mayor's law firm was practicing under conditions which show a clear conflict of interest. Yet, neither of them called for an investigation."

The Court held that this did not constitute libel of a partner in the mayor's law firm. The privilege of a citizen

to criticize official conduct is part of the evolving body of the law of libel which now recognizes that public officials in the performance of their duties enjoy a concomitant immunity when they speak out on matters of public concern, even if a particular citizen be defamed. The threat of a damage suit should not be permitted to prohibit or curtail the freedom of expression of either the citizen or the public servant, citing New York Times v. Sullivan, 376 U.S.A. 282-283.

Rosenblatt held that the definition of malice to include ill will, evil motive, or intent to injure, is constitutionally insufficient where discussion of public affairs was concerned; a civil remedy in a libel action might be allowed only where there is a showing of actual malice, as defined in N. Y. Times. In this respect, plaintiff's complaint is therefore found wanting, and is equally "insufficient".

Based upon the foregoing citations of authority, this Court is of the opinion that defendant News and its Editor, did not abuse the qualified privilege accorded them. They were reporting on matters of grave public concern. The alleged defamatory document (Exhibit A) had been delivered to the Michigan Fair Election Practices Commission (or was to be delivered shortly thereafter). The publisher, in this instance, was faced with the dilemma discussed in Lawrence v. Fox, namely "the more serious the charge of wrongdoing by public official, the more urgent the need for its airing — yet, the more serious the charge, the greater the libel. It is in this uneasy and menacing situation that the law provides the publisher a sanctuary of sorts— the defense of privilege. The great underlying principle upon which the doctrine of privileged communication stands is public policy."

This was the dilemma confronting the defendants News and Mr. Hayden. For this Court to close its eyes to the pronouncement of Sullivan, Rosenblatt and other cases, would seriously curtail, inhibit and indeed, prevent debate on public issues, political doings and candidates. Were this Court to hold otherwise, debate, discussion and freedom of expression at all Congressional meetings would be sheared and abridged. Any time a delegate or a congressional chairman chose to speak out either for or against those of his own party or for or against those of the opposition, he would be in constant fear of a libel suit for damages.

The motions for summary judgment of defendant Evening News Association and Martin Hayden, are supported by affidavits, wherein it is stated that these defendants neither acted with actual malice either toward any of the plaintiffs or in any way in connection with the entire matter. Their affidavits establish, as did other news agencies that they received a press release copy of Senator Stahlin's request and complaint from the Senator's press representative. They had no personal belief that any of the statements contained in the requests or complaint were false. They relied upon the Senator's integrity and assurance of his press representatives that the statements could be substantiated. They knew that the Senator was a high public official and a Republican candidate for lieutenant governor. They also knew that the request and complaint were addressed to the chairman and members of a Public Commission whose purpose was the investigation of such complaints. They understood that the original request and complaint would be sent to the Commission the day they received their copy. They did not distribute or publish any copy of the request or complaint. The only action taken by them

was to publish, two days later, a news article concerning the request and complaint and Mr. Durant's comments thereon. The News article was published by them because they considered Senator Stahlin's request and complaint matters of broad, genuine and public interest and concern. Their only purpose was to inform the public of such matters. They had no personal animosity or malice toward any of the plaintiffs herein. *The article published by them does not mention any of the plaintiffs herein.*

The affidavit of defendant Martin Hayden is not controverted by that of Charles Ferry. The Ferry affidavit indicates that defendant Stahlin informed Mr. Ferry that he had talked to Martin Hayden, Editor of the News, and was told that if the said Stahlin would make a public attack against Richard Durant, he would have the editorial support of the Detroit News in his campaign for lieutenant governor; that the first test for the News support was the candidate's position on Durant; that such a public attack against Durant would help get rid of Durant in the Fourteenth Congressional District, and therefore, the News would support said Stahlin. This portion of the affidavit, while hearsay, is controverted by the sworn deposition taken earlier from Senator Stahlin wherein he testified that Martin Hayden did not tell him to attack Durant; that he did not mention Durant and that the actual discussion was as to the "mess" in the Fourteenth District. Senator Stahlin further testified under oath that publicity was not discussed with Mr. Hayden and that he and Mr. Hayden had no conversation concerning an attack on Durant.

More important however, is that portion of the affidavit commencing at the bottom of page six wherein Mr. Ferry

states that he wrote Exhibit A, using material from the following sources: From Paul Bagwell, from Glenn Engle, from Donald DeRosen, from Herman McKinney, from Jack Gibbs, from Norman Stockmeyer, and he finally concludes by saying that he obtained information from nearly every facet of party leadership not heretofore mentioned—general confirmation of most, if not all, items. By "party leadership", Mr. Ferry says, he means a series of continuing conversations with individuals mentioned herein and others who expressed their alarm over the possibility of Richard Durant becoming chairman of Wayne County and supplied or confirmed gossip used in the preparation of "Exhibit A". Thus, the conclusion is inescapable that all of the allegations in "Exhibit A" were obtained from those interested in the welfare, progress and success of the Republican Party.

This Court is of the opinion that upon an anlysis of the Hayden affidavit, the Engle affidavit and that of defendant Charles Ferry, the Detroit News, a public newspaper, because of the constitutionally guaranteed freedom of the Press and the necessity that the public be informed on matters affecting the public interest, is legally protected in publishing the complaint as made (Exhibit A). It was not the responsibility of defendants News or Martin Hayden to make a private investigation to ascertain the truth or falsity of the allegations in Exhibit A. On the contrary, they were justified in relying upon the source of the information, that is to say, the letter of Senator Stahlin attached to the exhibit; the fact that it was disseminated to the Michigan Fair Election Practices Commission, and moreover, as now learned from Mr. Ferry, "the informations gathered from reputable leaders of the Republican Party."

Assume for the sake of discussion that defendants News and Martin Hayden were motivated in providing publicity for candidate Stahlin. This has no bearing on the ultimate issue in this cause because motive (ill will), as indicated supra, is not to be considered as a part of the constitutional test outlined in New York Times.

There is nothing before this Court other than the bare allegations, unsupported by fact, in plaintiffs' complaint that defendants News and Hayden published Exhibit A with actual malice. Affidavits supplied by plaintiffs in the form of the Ferry affidavit, would give plaintiffs no comfort. Nowhere therein is there anything from which this Court can even infer that the publication was done with actual knowledge of falsity or with reckless disregard of falsity or truth. Indeed, it may be said unequivocally that inasmuch as the document had been submitted to the Fair Election Practices Commission, it then become public property, and as such, may be the object of full disclosure by the public press.

In short, this Court is of the opinion that defendants News and Martin Hayden had a right to rely upon the information supplied them by Senator Stahlin and submitted to the Fair Election Practices Commission. It was furnished to them in the ordinary course of news dissemination and published routinely by defendants in the ordinary course of their business endeavors — the dissemination of news to the general public.

As said in Walker v. Courrier Journal and Louisville Times Company, 246 Fed. Supp. 231 (1965),

> "Everyone knows that news of any matter of public concern possesses a limited lifetime, for to be news it must be published with promptness and dispatch in

order that the public be kept informed as to the actions of 'public men', and their activities in connection with matters of public concern."

Defendants News and Hayden had a right to rely on their source. Their doings were as consistent with good faith as with bad faith.

Controlling in the instant case factwise, procedurally and in legal pronouncement is Walker v. Courrier, supra. The doctrine of the Times case extends not only to public officials. It has been clearly announced in Times wherein the Court cites with approval, Coleman v. MacLennan, 78 Kan. 711; 98 P. 281:

> "This privilege extends to a great variety of subjects and includes matters of public concern, public candidates, public men and candidates for office."

In Sullivan v. Times, the Court stated,

> "We, hold today, that the constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct."

This is such action. Accordingly, this Court is of the opinion that plaintiffs were public men engaged in matters of public concern. In each and every instance, plaintiffs have alleged in their complaints that they were politically active and that because of such activity, they were damaged by the alleged libelous publication. The plaintiffs identify themselves as individuals actively engaged in political activities. Plaintiffs Arber, Heenan, Lady, Plas and Zimmerman, each specifically state that, "to effectuate his or her responsibility as a citizen, he or she has been and now is active politically".

Plaintiffs Robbins, Bell and Brook allege that they were

active in a political arena in the community, Wayne County and throughout the State of Michigan; that they became politically active to effectuate and perpetuate their individual and joint responsibilities as liberal, conscientious, loyal and patriotic citizens. Plaintiff Clink states in his complaint that to effectuate his responsibilities as a citizen, he has been, for nearly fifteen years, active politically in his community and in the total city of Detroit, in the County of Wayne and in the entire State of Michigan and nationwide.

True, plaintiffs are not public officials within the commonly accepted meaning of the word. However, they are identified as persons of political prominence. Indeed, some may have been, were, or are precinct delegates, working within their particular districts. As such, a precinct delegate, one acting in the furtherance of party politics, is a public person. As a party worker, as a delegate, as a political kingmaker, he occupies an important position in the political arena. As a delegate, he nominates important state offices such as that of the attorney general, Supreme Court judges, secretary of state and as a precinct delegate, he likewise nominates candidates for president of the United States and vice president. He adopts, writes and formulates party policies, party platforms, not only on the state level, but on the national level. Surely, no one can deny that he is one who is a public man, thus makes himself public property. They should have reasonably foreseen that being a person of political prominence, they would subject themselves to criticism of contemporaries, adversaries and co-workers in the cause of party politics (Walker v. Courrier Journal and Louisville Times Company, Inc., supra). Public men are, as it were, public property, hence the

doctrine of New York Times v. Sullivan is applicable to the instant case. The decision of Judge Friendy in Pauling v. Louis Syndicate Company, 335 Fed. 2d, 659, favorably presages the result here. The language of Walker v. Courrier, supra, is applicable.

> "In connection with the last above quoted language, the Supreme Court included a footnote to its opinion (footnote 23), in part as follows: 'We have no occasion here * * * to specify categories of persons who would or would not be included'."
>
> "From this language—"

says the Court in Walker,

> "--- I believe the Supreme Court of the United States has served clear notice that the broad constitutional protection afforded by the First and Fourteenth Amendments will not be limited to public officials only. For to have any meaning, the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to public officials only, then why footnote 23? I subscribe that footnote 23 is of vast importance in understanding the intended scope of the Supreme Court's opinion, for it is a departure from the Court's judicial rule of basing its decision on the narrowest constitutional grounds and is interpreted by this Court as giving special significance to this broad language adopted in arriving at its decision."

Thus, the conclusion is inescapable that each of the complainants or plaintiffs herein, was a person in his own right of political prominence.

This Court feels somewhat like Judge James F. Gordon who wrote in Walker that he adopted the foregoing position feeling that perhaps he was plowing new ground in legal effect, but this Court, like Judge Gordon, feels with the accompanying conviction that not to do so would make the spirit of the Times opinion which he believed and this Court believes also to be, a "profound national commitment to the principal that debate on public issues should be uninhibited, robust and wide open".

Public debate cannot be uninhibited, robust and wide open if the news media are compelled to stand legally in awe of error in reporting the words and actions of persons of political prominence and influence (not necessarily public officials, but persons in the political and public arena), who are nevertheless voluntarily ejecting themselves into matters of grave public concern, attempting thereby and and through use of their leadership and influence to mold public thought and opinion to their own way of thinking. These men, like so many party stalwarts, seek the spotlight of the stage of public prominence, party prominence, political prominence, and in so doing, they must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern. Thus, repetitive as it may be, these plaintiffs must establish that the statements as published were knowingly false or were published with a reckless disregard of their falsity or truth. Quoting Walker,

> "The question of existence of actual malice, from the facts taken as true, is a matter of law to be determined by the Court."

In point are the now famous cases of Dr. Linus C. Paul-

ing, a world famous scientist, winner of the Nobel Prize for chemistry and the Nobel Peace Prize. Dr. Pauling brought an action in New York against the National Review, Inc., for libel, based on two articles, one in the National Review of July 17, 1962, and one in the issue of September 25th, 1962, wherein he was referred to as a collaborator, that is to say, and we quote,

> "Take second, Professor Linus Pauling of the California Institute of Technology, once more acting as a megaphone for Soviet policy, boycotting the world peace conference that the Communists have called for this summer in Moscow, just as year after year since time immemorial he has given his time, his name, his energy, voice and pen to one after another Soviet serving enterprise * * *"

Among other things, these statements precipitated the civil action of Dr. Pauling.

Mr. Justice Silverman of the New York Supreme Court wrote a lengthy opinion dismissing the complaint at the close of the plaintiff's case in the trial of Dr. Pauling v. National Review. The Court has before it this lengthy and scholarly opinion. Justice Silverman quoted at length from the cases cited in this opinion. The opinion was written in April of 1966, a copy of which was obtained by this Court from Mr. Justice Silverman. Pointed portions of the Silverman opinion are thusly stated,

> "It is clear that if any private citizen has, by his conduct, made himself a public figure, engaged voluntarily in public discussion of matters of grave public concern and controversy, by doing so, he also has limited his legal remedies for any claimed libel of his reputation."

He further concluded that in determining the relative importance and protection to be given to the interest in public discussion on the one hand and the safeguarding of individual reputation on the other, the Supreme Court, in New York Times case has shifted the balance sharply in favor of the freedom of public discussion. (See also the decision in Pauling v. News Syndicate Company, 335 Fed. 2d. 659.)

Note too, that Justice Silverman's opinion discloses a reliance upon the case of Gilberg v. Goffey, (21 A. 2d 517, 1964, affirmed by the New York Supreme Court, 15 N.Y. 2d, 1023, 1965) wherein the New York State Court applied the New York Times doctrine to a law partner of the mayor of the city who sued a rival candidate for mayor for libel when the latter said that the mayor's law firm (of which plaintiff was of course, a partner), was practicing law under conditions which showed a conflict of interest. The Court said that although the plaintiff was not a public official, plaintiff's action is so closely related to criticism of a public official that the Times case is determinative. In that case, summary judgment was granted to the defendant who made a political speech which was distributed earlier to the press for publication. It is of significance too, that the mayor's law partner was not named. The important language of that decision follows:

> "The privilege of a citizen to criticize official conduct is part of the evolving body of the law of libel which now recognizes that public officials, in the performance of their duty, enjoy a concomitant immunity when they speak out on matters of public concern, even if a particular citizen be defamed in

the process." (Sheridan v. Crisona, 14 N.Y. 2d 108; 198 N.E. 2d. 359.)

"The threat of a damage suit should not be permitted to inhibit or curtail the freedom of expression of either the citizen or the public servant."

The New York Court in Gilberg emphasized that it was of no avail to plaintiff to claim that he was not a candidate for any public office and that he was outside the political arena. This Court gives emphasis to the fact that in the Gilberg case, the trial court had denied motions for summary judgment. The Appellate Division and the Supreme Court reversed, and held that the defendant was entitled to a summary judgment. In concluding that the plaintiff in Gilberg was not a candidate, the Court of New York held that it was of no avail to him to claim that he was not a candidate and that he was outside the political arena. The Court stressed the point that the law firm of which he was a member had generated the public issue on which the defendant made comment:

"In our opinion, having entered the fray, as champion of that law firm, plaintiff made himself as much a party of the local political campaign as did his law partner, the mayor."

This Court concludes, as did Mr. Justice Samuel Rabin in the Gilberg case, that the defendants News and Martin Hayden, had not only the right and the duty to publish what they did publish, and that these plaintiffs must find solace in the philosophy that men in public life must be men of fortitude "who must endure exposure to the vicissitudes of argument in the public forum, where half-truths, misinformation, and worse, are not uncommon in the furor and in the tempo of a political campaign".

It is imperative to observe that in Gilberg, the name of the plaintiff was not mentioned because in these cases, before this court, not one plaintiff was mentioned by name in the publication of May 13th, 1962.

The Court agrees with defendants, in brief, when they argue that even as a matter of law, had the article libelled the two political groups to which these plaintiffs belonged, such libel was not of and concerning these individual plaintiffs, no attempted innuendo could make it so. (See Lewis v. Soule, 3 Mich. 514; Noral v. First Publication, Inc. 104 P. 2d, 860; Golden North Airways, Inc. v. Tanana Publishing Company, 218 Fed. 2d, 612; Watson v. Detroit Journal Company, 143 Mich. 430; Service Parking Corporation v. Washington Times Company, 92 Fed. 2d. 502.

It may be well in passing, to examine the record of proceedings with respect to defendant Charles A. Ferry, deponent, whose affidavit was filed by plaintiffs April 7th, 1966. On January 25, 1965, almost two years ago, plaintiffs defaulted defendant Charles A. Ferry and such default continues as of this time.

An affidavit filed by plaintiffs from a defendant now in default, merits some scrutiny and cautious examination. However, as indicated in earlier paragraphs of this opinion, the affidavit gives no comfort to plaintiffs, but on the contrary, establishes two things:

(1) That the communication was a qualified privilege and,

(2) That the defendants herein acted without malice and with the honest belief that the statements contained in the said libelous document were true.

This same affidavit also negates any concept that these

defendants caused dissemination or publication of the alleged defamatory document with a reckless disregard for its truth or falsity.

Wherefore, the motions for summary judgment on behalf of the Evening News Association is granted for the reasons hereinabove set forth. Judgments may be entered accordingly.

II

Defendants Bagwell, Stockmeyer and Stahlin all make motions for summary judgment on the the grounds that there is no fact issue and that the plaintiffs do not state a cause of action. This Court is informed that no depositions were taken in these cases. Hence, all that there is before the Court to determine whether there is a genuine fact issue are the pleadings of plaintiffs and the affidavits filed in support of the respective defendants' motion and the plaintiffs' affidavit of one Charles Ferry, filed April 6, 1966. Reference to these affidavits will be made in later paragraphs of this opinion.

These defendants urge in brief and oral argument that the complaint filed with the Fair Campaign Practices Commission (Exhibit A), was an absolutely privileged communication. With this contention, this Court does not agree. Generally speaking, absolute privilege is confined to cases in which the public service or the administration of justice require complete immunity from being called to account for language used. It applies more directly to matters of public concern such as language used in legislative, judicial and executive proceedings and is not intended so much for the protection of those engaged in the service as it is for the promotion of the public welfare

(Ginger v. Wayne Circuit Judge, 369 Mich. 680).

In Harper and James, The Law of Tort, Section 5.23, "Proceedings before administrative tribunals exercising quasi-judicial powers and before executive officers also come within the rules pertaining to absolute privilege. The protection is extended to members of the commission or tribunal and to witnesses or complainants before it, and this is especially true if the complainants are persons or corporations subject to regulation by the administrative body in question. (See Smith v. O'Brien, 88 Fed. 2d. 769; Allegana v. New York and Cubain Mail, 279 N. Y. Supp. 319; Staffney v. Standard Oil Company, 71 N. D. 170; 299 N. W. 582.)

The majority of opinions throughout the country hold that a person is not subject to a suit for libel in matters filed in judicial proceedings or before bodies whose duties are quasi-judicial, board or commissions (Krumin v. Bruknes, 259 Ill. 9 App. 503).

Absolute privilege as distinguished from qualified privilege has been extended to many inquiries that are not conducted before Courts of justice or courts of record ... to proceedings before the Interstate Commerce Commission. (See Independent Life Insurance Company v. Rogers, 165 Tenn. 447.)

The Michigan Fair Election Practices Commission is not such a board, having either administrative authority, quasi-judicial, nor is it in any sense a creature of any statute in this state. It came into being in 1952. Its members are appointed by the governor of the state. It is made up of citizens of prominence and stature. It has no subpoena power. Its findings are not binding upon anyone; while it does make effort to encourage a fair election

practice by soliciting voluntary cooperation and voluntary pledges from candidates, it has, to use a trite expression, no teeth, no statutory authority and makes no findings, excepting in the dissemination of information. It is an attempt to bring together a cooperative modus operandi with respect to elections by candidates of both parties and political leaders. Its members serve as volunteers. They receive no remuneration. Their service is available because of their desire to serve the public with respect to election practices. It is not comparable with Unemployment Compensation Commission, Interstate Commerce Commission, a Liquor Control Board, an Election Commission, or any statutorily created board or administrative reviewing authority. It is unlike the State Health Department which has supervisory control over its employees as noted in Nuyen v. Slater, supra.

Defendants also urge that the complaint filed with the F.E.P.C. (Exhibit A), was protected by a qualified privilege. (See Timmis v. Bennett, 352 Mich. 355; Lawrence v. Fox, 357 Mich. 135, and Buffalino v. Maxon, 368 Mich. 140.)

This Court agrees with the latter contention that the publication in issue in these causes is conditionally or qualifiedly privileged. The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a manner in which the parties have an interest or duty and is not restricted within any narrow limits. (See Buffalino v. Maxon, supra;

33 Am. Jur. Sec. 126, p. 124, 126.)

This Court determines, as a matter of law, that qualified privilege exists with respect to the alleged communication

QUERY: What was the occasion? What is it that makes this communication privileged? As stated in Walker v Courrier, supra, the privilege extends to a great variety of subjects and includes matters of public concern, public men and candidates for office.

Defendant Bagwell was a candidate for governor in 1958 and 1960. Defendant Stahlin was a state senator and candidate for lieutenant governor. Defendant Stockmeyer was the chairman of the Wayne County Republican Committee. Each of these men rightfully believed and assumed that the success of the Republican Party, its progress, and its stature as a political party, cast on them the duty of making such a communication to other persons in the performance of such duty. As indicated in their affidavits, they believed it was right in the interest of society, their party and the State of Michigan that they should relate to the Fair Practice Election Commission, certain facts which they, by affidavit, contend they did in good faith proceed to do. They, by affidavit, contend, which affidavit is not controverted, in good faith, had an interest, as leaders, molders, directors of the destiny of the Republican Party, and charged with the responsibility of electing the Republican candidates in the present election. They believed, as they contend by affidavit, that this was their duty and their duty was to disclose these facts to the Commission, to other Republicans, to communications media, who had a corresponding interest or duty. This is so even though it may contain matters which without this privilege would be actionable. While their duty was not a legal one, it was their

judgment that theirs was a moral, social and political duty of imperfect obligation. (See Buffalino v. Maxon, 368 Mich.; Lawrence v. Fox, 357 Mich. 134; Timmis v. Bennett, 352 Mich. 355)

The occasion was explored and explained, as indicated in Lawrence v. Fox and Durant v. Stahlin, 375 Mich. 628, wherein the Supreme Court of this State indicated that the depositions and pleadings established that there was a long standing political conflict between one Richard Durant and other Republican leaders in the Fourteenth Congressional District. The Court pointed out that there were hundreds of pages of testimony as to political conflicts at the time within the Republican Party. It has been established on the record in this Court, as well as by the Supreme Court, that there was a strong movement to oust the leadership of the Fourteenth Congressional District. There was strong opposition to Mr. Richard Durant and his followers, out of which opposition arose this litigation (including Durant v. Stahlin, 375 Mich. 628).

As stressed in Walker v. Courrier Journal, supra, the privilege extends to a great variety of subjects and includes matters of public concern, public men and candidates for office.

The Supreme Court of the United States enforced the rule that the broad constitutional protection afforded by the First and Fourteenth Amendments would not be limited to public officials only, for to have any meaning, the protection must be extended to other categories of individuals or persons involved in the area of public debate, or who have become involved in matters of public concern.

Each and every one of these defendants were engaged in a political arena—were engaged in a political battle,

They were waging a hard fight to assure victory for their party status and in keeping with the traditions of the Republican Party as they saw it.

Thus, this Court determines that as a matter of law, a qualified privilege exists with respect to these defendants and the alleged communication. Accordingly, this Court need not labor this opinion with a repetition of authorities and findings in the Detroit News and Martin Hayden opinion. *The same principles are adaptable and applicable to each and every one of these defendants, namely, Messrs. Bagwell, Stockmeyer and Stahlin.*

An examination of each of the affidavits submitted in support of the motions for summary judgment is necessary and opportune. This examination becomes meaningful as it is incumbent upon this Court to ascertain whether there is a genuine fact issue and whether or not plaintiffs have by pleadings, asserted a cause of action. It must be borne in mind, there are no depositions. All there is before this Court are the affidavits of each defendant and the affidavit of defendant Charles Ferry filed by plaintiff.

Defendant Stahlin, under oath, says that in the spring of 1962, he received information from Mr. Charles Ferry, a writer and research assistant employed by him, and Mr. Paul Bagwell and others, concerning activities of certain groups in connection with the Republican Party and a forthcoming Primary Election in Wayne County. He concedes he had no personal knowledge of all this information but he believed that it was true. He also states that as a State Senator and aware of his responsibilities, as an interested Republican and citizen, he communicated this information with the Michigan Fair Prac-

tices Commission. At the time of such communication, he believed that the information contained in the exhibit was true. Believing it to be a matter of public interest, he thought the public generally should be advised of this information. He asserts that he acted in good faith with a conviction that the information was true. He contends that he had the responsibility and obligation to bring this to their attention. He further unequivocally states that he acted with no ill will or malice towards plaintiffs in this cause.

The Bagwell affidavit contains, in general terms, the following statements, "That in 1958 and 1960, he was a candidate of the Republican Party, and in May, 1962, he was the titular head of the Republican Party in the State of Michigan, and in such capacity, conferred with numerous officials, candidates and would-be candidates for office in government and the Republican Party itself. In May of 1962, he received information from Karl B. McKeehan, a longtime Republican worker, which information and material, Mr. Bagwell turned over to defendants Stahlin and Ferry. (This Karl B. McKeehan was granted summary judgment in each of the cases now before this Court by the Hon. Joseph A. Moynihan, which were affirmed on appeal in Zimmerman v. Stahlin 374 Mich. 93.)

Mr. Bagwell further says that the document entitled 'Greetings', called for delegates for George Lincoln Rockwell Delegates, Inc. U.S.A., and was an actual bulletin which had been circulated in the area and had been sent from defendant Stockmeyer to defendant Bagwell. The document promised further announcements. Defendant Bagwell further says under oath that he did not know that the allegations set forth in the material turned over

by him were false. He further denies any ill will or malice towards anyone."

Defendant Stockmeyer, by affidavit, denies either directly or indirectly, compiling any material for, or formulating or preparing or publishing the alleged document attached to plaintiffs' complaint. He denies directly or indirectly agreeing or entering into any understanding or plan to make the alleged document, Exhibit A. He further asserts that he did not discuss its formulation, compilation, preparation, publication or distribution with any other persons named in plaintiff's complaint, prior to the time of its publication. He denies any knowledge of the existence of the exhibit or that it was being compiled, formulated, prepared, published or distributed prior to its publication in newspapers of the City of Detroit.

It is the opinion of this Court that the Ferry affidavit does not controvert the affidavits filed by defendants Bagwell, Stahlin and Stockmeyer. Mr. Ferry's affidavit admits that the material used in the document that was submitted to the F.C.P.C. was the subject of discussion among the highest ranking members of the Republican Party prior to the preparation of the exhibit. He says he discussed the subject with at least the following persons: Elly Peterson, Norman Stockmeyer, Jack Gibbs, Donald DeRosen, Richard VanDeusen, Herman McKinney, Paul Bagwell, Glenn Engle and Stanley Thayer, all of whom, with the possible exception of Thayer, confirmed the accuracy of the information. He further swears that both he and Stahlin believed the information given them by Mr. Bagwell. He further, in general terms, indicates that many others high in the Republican Party, were gathering information on the same subject. He says in

clear terms that he received information from nearly every facet of party leadership not heretofore mentioned, and general confirmation of most, if not all, of the items set forth in Exhibit A.

In his affidavit, Mr. Ferry also indicates that the using of the complaint with the Fair Campaign Practices Commission was approved of by persons high in the party, Mr. Gibbs, Mrs. Peterson, Mr. Bagwell and Norman Stockmeyer. The affidavit further indicates and confirms that there was a fight between some of the Republicans, and an attempt to oust Richard Durant from leadership in the Fourteenth Congressional District.

Significantly, he says "that he and defendant Stahlin believed the information given them by Paul Bagwell and Paul Bagwell told him that his group would continue to investigate Durant and would come out with a further attack of their own subsequent to the publication of Exhibit A." He further admits that Bagwell, in his meetings and in his conversation, was acting as a spokesman for the Republican Action Committee.

In reviewing the affidavit of deponent Ferry, this Court is constrained to conclude that from its four corners, while it contains hearsay and matters conclusionary in nature, the factual statements therein contained negates any concept of malice as defined in Times v. Sullivan. On the contrary, the affidavit establishes rather conclusively in the view of this Court, that these defenants did not know that the contents of the exhibit were false, nor did they conduct themselves in utter and reckless disregard of the truth or falsity of the contents of the document.

It may also be said that nowhere in the affidavit can

a fair inference be drawn that these defendants knew that the contents of the document were false or that the complaint as filed was false, or that they acted in a reckless disregard of its truth or falsity. On the contrary, the affidavit, from its four corners, lends strong support to the findings of this Court as heretofore discussed in the News-Hayden cases, and strengthens the judgment herein made that the document was a qualifiedly privileged one.

Even though it may be argued that there was ill will, evil motive, intent to injure on the part of these defendants in their attempts to oust Richard Durant, it has been held that a definition of malice to include ill will, evil motive, intent to injure, is "constitutionally insufficient where discussion of public affairs is concerned". A civil remedy in a libel action might be allowed only where there is a showing of actual malice as defined in New York Times. (See Rosenblatt supra, and Garrison v. Louisiana, 379 U. S. 64; Times v. Sullivan.)

This Court is of the opinion, therefore, that there is no genuine fact issue and/or that plaintiffs do not assert or allege a cause of action against the defendants herein named. Motions for summary judgments are granted. Orders may be entered accordingly.

/s/ Joseph G. Rashid
Circuit Judge.

(Title of Court and Cause)

SUPPLEMENTAL OPINION RE MOTION TO SET ASIDE SUMMARY JUDGMENT

On January 13, 1967, pursuant to the Opinion of the Court dated December 28, 1966, summary judgments were entered in the above cases in favor of defendants The Evening News Association, Martin S. Hayden, John H. Stahlin, Paul Bagwell and Norman O. Stockmeyer.

On January 6, 1967, plaintiff in each case filed a "Motion To Set Aside Summary Judgments And Grant A Rehearing". The motions were not accompanied by brief or affidavit (other than as to counsel's belief that the motions should be granted). They were presented orally by counsel on February 10, 1967 and were denied from the bench. With respect to the denial, the Court is of the following opinion:

The General Court Rules appear to contain no specific authority for the motions. Insofar as they seek to set aside judgments, Rule 528 may be applicable. In any event, the Court considered them on their merits.

In support of the motions, counsel for plaintiffs contended that summary judgment was improper because plaintiffs' complaints sufficiently alleged that the alleged libels were published with knowledge of falsity and that a recent decision of the New York District Court had ruled that the question whether malice in the constitutional sense existed should not be determined upon a motion for summary judgment.

Plaintiffs' conclusory allegations of falsity were noted and discussed in the December 28, 1966 Opinion. It was, and is, the opinion of the court that such allegations were part and parcel of a conclusory allegation of malice in the sense of ill will and that they are insufficient as allegations of malice in the constitutional sense. Further, that inas-

much as all of the motions for summary judgment were also predicated upon Rule 117.2 (3), (the contrary statement at page four of the December 28th Opinion as to the motions of defendants News and Hayden is overly restrictive as to these motions; c.f. pages 22-24 discussing the applicability of the Ferry affidavit to these motions) plaintiffs' allegations were insufficient and summary judgment was properly granted in the light of the undisputed facts.

Goldwater v. Ginzberg (SDNY 1966) is unpersuasive. It appears that, based upon the depositions therein, the Court found that there was a "genuine issue as to the existence of actual malice" on the part of the defendants therein for several factual reasons which the Court delineated in its opinion. Herein, not only does no such issue appear but the affirmative showing made in the Ferry affidavit which was filed by plaintiff is to the contrary.

The decisive features of these cases may be restated as follows: Where a communication is privileged, the plaintiff must affirmatively allege not only the falsehood of its contents, but also that it was published with express malice. Unless he alleges both of these points, he must fail. Plaintiffs' complaints are found wanting in failure to allege that express malice as announced in New York Times versus Sullivan. This Court concluded that summary judgment should be granted because of such failure of pleading in the complaints and also because the affidavit filed by plaintiff hereinabove referred to as the "Ferry Affidavit" indicates an absence of a material fact issue. (See Weeren v. Evening News Association, 2 Mich. App. 74).

Judgment may be entered accordingly.

JOSEPH G. RASHID
Circuit Judge.

A True Copy
EDGAR M. BRANIGIN, Clerk
By: A. G. NADER, Deputy Clerk

OPINION OF MICHIGAN COURT OF APPEALS

[Filed March 25, 1968]

Before: Lesinski, C.J., J. H. Gillis and T. G. Kavanagh, JJ.

T. G. Kavanagh, J.

This matter involves six libel actions which arose out of a political conflict between, on the one hand, supporters of one Richard Durant (plaintiffs herein) and, on the other, leaders of the Republican Party in Michigan, who allegedly were attempting to oust Durant from a position of influence within the party. The alleged libel was contained in a letter, with an attached enclosure, which defendant Stahlin sent to the Michigan Fair Campaign Practices Commission, charging plaintiffs with improper political activities. In their complaints plaintiffs allege that the defendants participated in the preparation and publication of the allegedly libelous document, that the charges contained in the document were false, and that defendants knew that they were false and maliciously caused it to be published for the purpose of damaging the reputation of plaintiffs. Each defendant filed an answer to the complaint and a motion for summary judgment with an affidavit in support of the motion, pursuant to GCR 1963, 117. Each motion asserted that the proponent was entitled to judgment as a matter of law because there was no genuine issue as to any material fact. GCR 1963, 117.2(3). After hearing argument by counsel on the motions, the Circuit Court granted the motions of each defendant, and filed his written opinion, Plaintiffs have appealed.

We deal first with the granting of the motion for summary judgment as to defendants Martin S. Hayden

and Evening News Association. In addition to sending a copy of the enclosure to each of the members of the Fair Campaign Practices Commission defendant Stahlin delivered a copy to the above two defendants who allegedly caused to be published in the Detroit News a news story relating some of the contents of the enclosure. The news story, a copy of which has been made part of the record on appeal, makes no reference to any of the plaintiffs. It does, however, refer to some political organizations, e.g. the John Birch Society and Young Americans for Freedom, *inter alia,* to which plaintiffs claim to belong. Plaintiffs contend that the charges made against these organizations were generally understood to have been made against the members thereof, including plaintiffs, thus giving plaintiffs a right to recover. This contention was considered and rejected by this Court in *Chapman* v. *Romney* (1967), 6 Mich. App. 36. Accordingly, we hold that summary judgment was properly granted in favor of defendants Hayden and Evening News.

As to all defendants the Circuit Court determined that there was a qualified privilege under the holdings in *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254 (84 S. Ct. 710, 11 L ed 2 686) and *Associated Press* v. *Walker* (1967), 388 U.S. 130 (87 S. Ct. 1975, 18 L ed 2d 1094) and that plaintiffs could not recover in the absence of actual malice, defined as knowledge of the falsity of the statements made, or reckless disregard of their truth or falsity. The correctness of this determination depends upon whether plaintiffs are "public figures" under the decision in the *Walker* case. Mr. Chief Justice Warren, writing in *Walker,* said:

"To me, differentiation between 'public figures' and 'public officials' and adoption of separate standards of

proof for each has no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinction between governmental and private sectors are blurred. * * * This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions, or, by reason of their fame, shape events in areas of concern to society at large.

"Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, 'public figures', like 'public officials', often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct." 18 L. ed. 2d p. 1116.

In holding that plaintiffs herein are "public figures" we adopt the reasoning of the Circuit Court below:

"True, plaintiffs are not public officials within the commonly accepted meaning of the word. However, they are identified as persons of political prominence. Indeed, some may have been, were, or are precinct delegates,

working within their particular districts. As such, a precinct delegate, one acting in the furtherance of party politics, is a public person. As a party worker, as a delegate, as a political kingmaker, he occupies an important position in the political arena."

Since the defendants herein were qualifiedly privileged, the crucial question is whether they acted with actual malice, as defined by the *New York Times* and *Walker* cases, supra. The motions for summary judgment were properly granted *only* if there is no genuine factual issue as to the question of actual malice.

By their motions defendants challenged plaintiffs' ability to prove their allegations. When the motion asserts the absence of a genuine issue of material fact under GCR 1963, 117.2(3) and is supported by affidavit or other proof, the opposing party must submit affidavits or other proof of his own to establish that a genuine issue of material fact does exist. *Durant* v. *Stahlin* (1965), 375 Mich. 628; *Christy* v. *Detroit Edison Company* (1966), 2 Mich. App. 730.

Except for the affidavit of defendant Stockmeyer, the affidavits submitted in support of the motions contained sworn assertions that the defendants acted in good faith and without knowledge of any falsity in the contents of the enclosure. In opposition to the motions plaintiffs submitted the affidavit of one Charles Ferry, who had originally been a defendant in this matter and against whom a default judgment had been taken. There is nothing in Ferry's affidavit to contravert defendants' assertions of good faith and lack of knowledge. In fact, to the extent that it deals with the question of malice at all, the Ferry affidavit tends to corroborate defendants' position.

The Stockmeyer affidavit consists of sworn statements that he did not participate in the preparation or publication of the enclosure. The Ferry affidavit, in opposition to Stockmeyer's motion for summary judgment, asserts that the affiant discussed the publication of the enclosure with Stockmeyer and received information from him to be used in the exhibit. Since neither the Stockmeyer nor the Ferry affidavits deal with the question of malice as it relates to Stockmeyer, the disposition of his motion for summary judgment turns upon the pleadings. On the one hand, the complaint alleges that the defendants knew of the falseness of the charges in the enclosure, and, on the other, defendant Stockmeyer's answer denies any such knowledge. Viewing the pleadings and affidavits in the light most favorable to the plaintiffs, as we must for the purpose of these motions, we conclude that plaintiffs have raised genuine issues of material fact as to defendant Stockmeyer and accordingly the judgment of the Circuit Court granting his motion for summary judgment is set aside. The granting of the motions of the other defendants is affirmed for the reason that plaintiffs have failed to raise a genuine issue of fact as to the element of malice.

Lesinski, C. J., and J. H. Gillis, J., concurred.

OPINION OF THE MICHIGAN SUPREME COURT

[Filed September 3, 1969]

Before the Entire Bench, except T. G. Kavanagh and Kelly, J. J., T. M. Kavanagh, J.

This appeal is from orders of the circuit court granting motions for summary judgments as to defendants, The Evening News Association, Martin S. Hayden, Paul D. Bagwell, and John H. Stahlin. The motions arose in six cases which were consolidated by order of the Court of Appeals. The summary judgments were affirmed by that Court.

The original complaints in the six cases before us were filed in May, 1963. They arose out of a conflict between the plaintiffs, who were supporters of one Richard Durant, and certain leaders of the Republican party in Michigan, who allegedly were attempting to oust Durant from a position of influence with the party. The alleged libel was contained in a letter dated May 10, 1962, with an enclosure, mailed by then State Senator John H. Stahlin to the Michigan fair campaign practices commission, charging plaintiffs with improper activities.

Plaintiffs charge that the above circulated documents were libelous in that the statements made, and the natural inferences to be drawn therefrom, charged the plaintiffs with being members of and/or associated with groups and/or persons whose activities were detailed as consisting of bribery, diversion of party funds, intimidation, misrepresentation, threats of physical violence, anti-Semitism, anti-Negro sentiments, violation of the American tradition of honesty, decency and fair play, and Fascist, immoral and reprehensible conduct.

Defendants filed their several motions for summary judgments.

The motions of defendants The Evening News Association and Martin S. Hayden were based upon: (1) Claimed privilege in the matter of "transmission of Senator Stahlin's letter and enclosure of May 10, 1962, to the chairman of the fair campaign practices committee with copies to the members of said committee and to the press." (2) The publication by The Evening News Association of May 13, 1962, was privileged as a matter of law under the First and Fourteenth Amendments to the United States Constitution, and under Michigan Const 1963, art 1, §§ 3 and 5,[1] as being a matter of broad and general public interest. (3) The article did not name the plaintiffs and did not concern or libel plaintiffs as a matter of law. (4) There was no genuine issue as to any material fact and the undisputed facts show that defendants The Evening News Association and Martin S. Hayden did not act with actual malice toward plaintiffs. Attached to the motions were the affidavits of Frederick G. Engle, political writer for The Detroit News, and Martin S. Hayden, editor of The Detroit News. These affidavits, together with other affidavits hereafter mentioned, are contained in the appendix to this opinion.

The motions for summary judgments, with supporting affidavits, filed by defendants John H. Stahlin and Paul D. Bagwell relied upon GCR 1963, 117.2(3), alleging that there was no genuine issue as to any material fact in the action because the publication of the statements complained of was privileged and such statements were not libelous of the plaintiffs.

[1] Since the acts complained of occurred in May, 1962, Const 1908, art 2, §§ 2 and 4, were applicable.

In answer to the several motions for summary judgments, plaintiffs filed the affidavit of defendant Charles Ferry.

The motions for summary judgments were granted and orders were entered in the various cases on behalf of each of the defendants.

Plaintiffs appealed to the Court of Appeals. The Court of Appeals affirmed the grant of summary judgments "for the reason that plaintiffs have failed to raise a genuine issue of fact as to the element of malice." 10 Mich App 181, 188.

Plaintiffs are here on leave granted. 381 Mich 767.

This Court is requested — principally upon the authority of *New York Times Co.* v. *Sullivan* (1964), 376 US 254 (84 S Ct 710, 11 L Ed 2d 686) — to draw the fine line between speech unconditionally guaranteed and speech which may legitimately be regulated (see *Speiser* v. *Randall* (1958), 357 US 513, 525 (78 S Ct 1332, 2 L Ed 2d 1460)). This we cannot do.

The sole issue before this Court is whether summary judgments were properly or improperly granted. We hold that summary judgments were improperly granted.

While we agree with the lower courts that the *New York Times* standard relating to "public officials"[2] and its

---

[2] *New York Times Co.* v. *Sullivan* (1964), 376 US 254 (84 S Ct 710, 11 L Ed 2d 686). The *New York Times* standard imposing constitutional limitations upon libel actions brought under state law is as follows (pp 279, 280):

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

subsequent extension to "public persons"[3] is controlling if plaintiffs are in fact "public persons,"[4] we cannot agree with the conclusion that there is no question of fact as to "'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." See *New York Times,* supra p 280.

Let us examine the facts presently before us. The affidavits of defendants Engle and Hayden state that their sole participation in the alleged libel was the publication of defendant Stahlin's request and complaint to the fair campaign practices commission and Mr. Durant's comments thereon. The affidavits of all defendants aver that

---

[3] *Curtis Publishing Co.* v. *Butts* (1967), 388 US 130 (87 S Ct 1975, 18 L Ed 2d 1094), and its companion case, (*Associated Press* v. *Walker* (1967), 388 US 130, 87 S Ct 1975, 18 L Ed 2d 1094). By a 5-to-4 vote the United States Supreme Court adhered "to the *New York Times* standard in the case of 'public figures' as well as 'public officials.'" See the concurring opinion of Mr. Chief Justice Warren, 388 US 162, 164, joined in by Justices Brennan, White, Black and Douglas as to Parts I and II.

[4] While not dispositionally relevant to the case before us, we note that the term "public figure" has been defined as a person who by his accomplishments, fame or mode of living, or by adopting a calling which gives the public a legitimate interest in his activities, affairs and character, has become a "public personage," i.e., a celebrity. See Prosser, Torts, (3d ed 1964), § 112, pp 844, 845; see, also *Cason* v. *Baskin* (1947), 159 Fla 31 (30 So 2d 635); *Grayson* v. *Curtis Publishing Co.* (1967), 72 Wash 2d 999 (436 P 2d 756); *Dietemann* v. *Time, Inc.* (CD Cal), 284 F Supp 925; *News-Journal Co.* v. *Gallagher* (Del 1967), 233 A 2d 166. Of course, the public figure stature must exist prior to the alleged libel and not by virtue of the notoriety created by it.

Nothing in the record indicates that plaintiffs were in fact "public figures." In fact, defendant Hayden, who was the editor of the newspaper that published the alleged libel, and who was certainly in the best position to know the identities of "public persons" in the community, deposed that he "was not acquainted with plaintiff herein." We cannot agree with the circuit judge's facile reasoning that "some [of the plaintiffs] may have been, were, or are precinct delegates" and thus "a public person." This reasoning is unsupported by the proofs necessary to make such a finding of fact and is, at best, a conclusionary observation.

the publication was without actual malice, but all tacitly admit knowledge of the content of Exhibit "A".

On the other hand, we have the affidavit of defendant Charles Ferry, filed by plaintiffs, alleging that, as campaign manager for Stahlin, he was in close and constant communication with defendant Stahlin; that he knew Stahlin had been promised political support by certain party leaders if Stahlin would publicly attack Durant; and that The Detroit News, through Martin S. Hayden, would editorially support Stahlin in his campaign for lieutenant governor if he would publicly attack Durant.

Deponent Ferry further stated that — with this quid pro quo arrangement in mind to obtain the support of The Detroit News and the other defendants — he and Stahlin began gathering potentially damaging information and arranged to give defendant Engle of the News the "beat" on the story because it was the only paper which was really after the "Durant thing."

Ferry's affidavit gives in detail the time and the information received in the subsequent meetings. Deponent tells of the enthusiastic support of defendant Bagwell in planning and executing the attack on Durant and the discussions with The Detroit News' representatives, including Engle, Robert Poppa, Carl Rudow and Will Muller.

The end product of these meetings and political fact-gathering efforts with defendants and others was Exhibit "A". The exhibit was presented to The Detroit News through Mr. Engle and Mr. Hayden on May 11, 1962, prior to publication. According to deponent Ferry, Mr. Hayden released him at that time from giving the News the "beat," because he wanted it to have the greatest circulation possible. The exhibit was then mimeographed and distributed

to other news media and was published in The Detroit News on Sunday, May 13, 1962, prior to the mailing of Exhibit "A" to the fair campaign practices commission.

The record indicates that defendants had complete control over releasing the news and that they could have released it at any time. We observe, however, that it was not "hot news" requiring immediate dissemination as in *Associated Press* v. *Walker* (1967), 388 US 130 (87 S Ct 1975, 18 L Ed 2d 1094), but rather the type of news which by its very nature requires close scrutiny and careful verification (see *Curtis Publishing Co.* v. *Butts* (1967), 388 US 130 (87 S Ct 1975, 18 L Ed 2d 1094).

Viewing all of the conflicting representations in the affidavits, could not a jury find or reasonably infer that defendants intended solely to "get Durant" and that they were not in the least concerned with plaintiffs, who were virtual anonymities in the political area, or with the true facts regarding their participation in the Durant campaign? Could not a jury also find or reasonably infer that the hurried publication of the allegedly libelous document was indicative of a reckless disregard of whether it was true or not?

From these and other facts disclosed by the record, we find that reasonable minds could find or reasonably infer that the document was prepared and published with an intent to cause harm through falsehood or in reckless disregard of the truth or falsity of the allegations. See *Rose* v. *Koch* (1967), 278 Minn 235 (154 NW 2d 409). This creates a typical jury question.[4]

---

[4] We note with great interest that it is more than mere coincidence that the Federal authorities have consistently, under both the *New York Times Co.* v. *Sullivan* and *Curtis Publishing Co.* v. *Butts* standards, refused to grant summary judgment [see, e.g., *Gold-*

Where actual malice, in the sense that an alleged defamer knew the statement to be false or acted in reckless disregard of its truth or falsity, is alleged in any of the pleadings, the crucial and often determinative factor is credibility. As we have repeatedly emphasized, summary judgment is not available whenever a presented issue of material fact turns upon the credibility of an affiant or witness whose deposition has been taken. *Durant* v. *Stahlin* (1965), 375 Mich 628, and cases cited therein.

It is simply not legally sufficient to say that since plaintiffs did not prove by their affidavits a publication with knowledge of falsity or reckless disregard of truth or falsity, the fact of actual malice did not exist. The determination of actual malice depends on more than a mere denial; it must be resolved from a study of the witness on the stand, his interest or lack of interest in the case, his role in the publication of the alleged libel, and the many other factors making up the issue of credibility.

We hold that where, as here, the credibility of a witness or deponent is crucial, summary judgment should not be granted.

The judgments of the Court of Appeals and the circuit court are reversed and the causes remanded for further proceedings.

Plaintiffs shall have costs of the appellate courts.

T. E. Brennan, C. J., and Dethmers, Black, and Adams, J.J., concurred.

---

water v. *Ginsburg* (SD NY 1966), 261 F Supp 784; *Walker* v. *Courier-Journal and Louisville Times Co.* (CA 6, 1966), 368 F 2d 189)], or reviewed the case only after a full trial was held (see, e.g., *New York Times* v. *Sullivan, supra; Rosenblatt* v. *Baer* (1966), 383 US 75 (86 S Ct 669, 15 L Ed 2d 597; *Curtis Publishing Co.* v. *Butts, supra.*

Appendix B

"I, Frederick G. Engle, being duly sworn, depose and say:

"1. I have personal knowledge of facts herein stated and I am prepared if sworn as a witness to testify fully and completely thereto.

"2. I am, and since prior to 1962 have been, a political writer for The Detroit News.

"3. I first saw Senator Stahlin's May 10, 1962 request that the fair campaign practices commission conduct a full-scale investigation into the activities of certain extremists groups in connection with the then forthcoming Republican primary election in Wayne county and the attached complaint (Exhibit A to plaintiff's complaint) on Friday, May 11, 1962, when Senator Stahlin's press representative, Charles H. Ferry, delivered a copy thereof to the office of The Detroit News. I understood that there was a Michigan fair campaign practices commission, that Reverend Marshall R. Reed was its chairman, and that the persons shown as receiving copies of Senator Stahlin's request and complaint were the members of the commission. The commission conducted an investigation in response to the request and complaint.

"4. On May 11, 1962, Mr. Ferry had with him a stamped, sealed envelope addressed to the chairman of the commission which he said contained the original letter and complaint and which he was going to mail immediately. The copy of the letter and complaint which Mr. Ferry delivered to the News was for the use of the News as a public newspaper. I also understood that such copies were being delivered to the Dertoit Free Press and to other news agencies. The Detroit Free Press published an article regarding the

request and complaint on May 13, 1962. A copy is hereto attached.

"5. On May 11, 1962 I read Senator Stahlin's request and complaint. I knew that Mr. Ferry was Senator Stahlin's press representative. I asked Mr. Ferry if he was able to substantiate the statements made in the complaint and Mr. Ferry said that he could. I also showed the request and complaint to Martin Hayden, editor of The Detroit News, and introduced Mr. Ferry to him.

"6. Neither I nor Mr. Hayden nor The Evening News Association had anything to do with the mailing of the request and complaint to the commission or its members. None of us distributed or published any copies of the letter or complaint. The only action taken by any of us was to publish, on Sunday, May 13, 1962, the attached Detroit News article concerning the request and complaint and Mr. Durant's comments thereon.

"7. Said article was written by me and was published by The Detroit News on the understanding that the request and complaint was that of Senator Stahlin to the Michigan fair campaign practices commission and had been sent to the commission on May 11, 1962. Before writing or publishing the article I called Mr. Durant and discussed the charges with him; the article contains his comments.

"8. At the time of the receipt of the copy of Senator Stahlin's request and complaint and at the time of the publication of The Detroit News article I did not believe that any of the statements contained in said request, complaint or article were false. I knew Senator Stahlin and had a high regard for his integrity, both personally and as a Michigan senator and candidate for lieutenant governor. In writing The Detroit News article I also relied upon this

integrity and the assurance of Mr. Ferry that the charges made could be substantiated. My purpose in writing The Detroit News article was to inform the public of the filing of Senator Stahlin's request and complaint, a matter which I considered to be of broad and genuine public interest and concern. I was acquainted with the plaintiff herein and I had no personal animosity or malice toward him. My article does not mention the plaintiff herein. In mentioning the Republican Voters Associated as a group named by Senator Stahlin I understood that this group was a national political organization having hundreds of members.

"Frederick G. Engle"

"I, Martin S. Hayden, being duly sworn, depose and say:

"1. I am and since prior to 1962 have been, the editor of The Detroit News, a public newspaper published by defendant The Evening News Association.

"2. I first saw Senator Stahlin's May 10, 1962 request that the fair campaign practices commission conduct a full-scale investigation into the activities of certain extremists groups in connection with the then forthcoming Republican primary election in Wayne county and the attached complaint (Exhibit A to plaintiff's complaint) on Friday, May 11, 1962, when Senator Stahlin's press representative, Charles H. Ferry, delivered a copy thereof to the office of The Detroit News. I understood that there was a Michigan fair campaign practices commission, that Reverend Marshall R. Reed was its chairman, and that the persons shown as receiving copies of Senator Stahlin's request and complaint were the members of the commission. The commission conducted an investigation in response to the request and complaint.

"3. On May 11, 1962 Mr. Engle, a political writer for The Detroit News, brought a copy of Senator Stahlin's request and complaint to my office and introduced Mr. Ferry as Senator Stahlin's press representative who had delivered the copy to the News office. Mr. Ferry informed me that the request and complaint were being sent to the commission and copies were being delivered to the press.

"4. I had nothing to do with the mailing of the request and complaint to the commission or its members. I neither distributed nor published any copies of the letter or complaint. The only action taken by The Detroit News, Mr. Engle, or myself was the publication on May 13, 1962 of a news article written by Mr. Engle concerning Senator Stahlin's request and complaint and Mr. Durant's comments thereon.

"5. At the time of the receipt of the copy of Senator Stahlin's request and complaint and at the time of the publication of The Detroit News article I did not believe that any of the statements contained in said request, complaint or article were false. I did not question, and had no reason to question, the integrity of Senator Stahlin and I relied upon his integrity. I considered the filing of the request and complaint, and the matters referred to therein, as matters of broad and genuine public concern. I was not acquainted with the plaintiff herein and had no personal animosity or malice toward him. The article published by the News does not mention the plaintiff herein. I understood that Republican Voters Associated was a national political organization having a large membership.

"Martin S. Hayden"

"John H. Stahlin, being duly sworn, deposes and says:

"1. I am a defendant in the above-captioned cause.

"2. I make this affidavit in support of my motion for summary judgment in this cause, having personal knowledge of the facts stated herein.

"3. In May, 1962, I was serving as a member of the Michigan State senate. As a member of the Republican party, I also was a candidate for the Republican nomination for lieutenant governor.

"4. As a State senator, member of the Republican party, and candidate for State office, I knew in May, 1962, that Michigan had a fair campaign practices commission, the members of which were appointed by the governor. I further knew that the Michigan fair campaign practices commission investigated complaints of improper campaign practices and that the commission was officially charged with the responsibility of assuring that election campaigns in Michigan were conducted in accordance with American traditions of fair play.

"5. During the spring of 1962, I received information from Mr. Charles Ferry (a writer and research assistant employed by me), Mr. Paul Bagwell (a former Republican candidate for governor) and others concerning activities of certain groups in connection with the Republican party and a forthcoming primary election in Wayne county. Although I did not have personal knowledge of all of this information, I in good faith believed that such information was true. Aware of my responsibilities not only as a State senator and a candidate for public office, but as an interested Republican and citizen, I believed it to be my duty to communicate this information to and file a complaint with the members of the Michigan fair campaign practices commission, the official group responsible for investigating such charges. On that basis this information was

communicated to the Michigan fair campaign practices commission in substantially the form of Exhibit A attached to the complaint in the above-captioned action. At the time of such communication I, in good faith, believed that the information contained in said Exhibit A was true, and I still believe it to be true.

"6. At the time of said communication I also believed that the information contained in said Exhibit A was a matter of vital public interest involving very basic threats to the political processes and that Republicans and the public generally should be advised of this information as soon as possible.

"7. In communicating the information in said Exhibit A to the Michigan fair campaign practices commission and certain of the news media, I acted in complete good faith and with the conviction that such information was true and that in my position I had the responsibility and obligation to bring this information to their attention.

"8. At no time have I acted with any ill will or malice toward plaintiff in this cause, whose name was listed in said Exhibit A as a person associated with Republican Voters Associated. It was my good faith belief that the plaintiff had first-hand knowledge of some of the information contained in said Exhibit A and could testify to that effect before the Michigan fair campaign practices commission. To the best of my information and belief, no news article or other releases in connection with the filing of said Exhibit A with the Michigan fair campaign practices commission have mentioned plaintiff's name.

"John H. Stahlin"

"Paul D. Bagwell, being first duly sworn, deposes and says that he is one of the defendants herein, that he has

personal knowledge of the facts stated herein; and that, if sworn as a witness, he can testify competently to the facts contained herein.

"Deponent further says that:

"1. In 1958 and 1960 he was the candidate of the Republican party for the office of governor for the State of Michigan; that as such he was, in May, 1962, the titular head of the Republican party in the State of Michigan; that in such capacity, during and prior to May 1962, he conferred with numerous officials, candidates and would-be candidates for State, county and local offices and for offices within the Republican party itself and that he received numerous written reports and requests for money from many of such persons and others on their behalf.

"2. On or about May 8, 1962, deponent receved in his office in the Penobscot Building, Detroit, Michigan, one Karl B. McKeehan, a long-time Republican worker and leader in the 13th Congressional District. Mr. McKeehan came into deponent's office without prior appointment and delivered to deponent two documents. The first document was entitled '13th in trouble as follows' and consisted of two pages; the second document was entitled 'Delegate Expenses' and consisted of two pages. During McKeehan's visit, deponent wrote in his own hand on the first page of the document entitled '13th District in trouble as follows' the information following the names of the persons listed in items I and VI on said page and also wrote in his own hand the name 'George Zimmerman — 14th,' opposite item II on said page and the names 'Clive Hull — Birch, 459 Prentiss' and 'John A. Smith, Birch, 382 Pilgrim, Highland Park' opposite item IV on said page, which information he obtained from said McKeehan.

"3. Shortly prior to McKeehan's visit, deponent had received from defendant Norman Stockmeyer, Wayne County, Republican chairman, a half-page carbon copy of a document entitled 'Greetings — Greetings,' with a query as to whether deponent knew anything about George Lincoln Rockwell and his connection with the American Nazi party.

"4. On May 10, 1962 deponent was visited in his office in the Penobscot building by defendants John H. Stahlin and Charles Ferry. At that time defendant Stahlin was a duly elected Republican member of the Senate of the State of Michigan and a candidate for the office of lieutenant governor of the State of Michigan. Defendant Stahlin at that time indicated that he had uncovered certain practices which he thought were harmful to the Republican party and that he had made a decision to file such charges with the fair campaign practices commission, a commission theretofore duly appointed by the governor of the State of Michigan. At that time, in response to such statement, deponent turned over to said defendants a copy of the document entitled '13th in trouble' and of the half-page document entitled 'Greetings — Greetings' previously received as set forth above. These documents were retyped in deponent's office on May 10, 1962, including the handwritten notations deponent had made in his conference with Karl B. McKeehan and a carbon copy was delivered to said defendants Stahlin and Ferry. A copy of the material so delivered to defendants Stahlin and Ferry is attached hereto as Exhibit 1.

"5. At that meeting, Senator Stahlin indicated he had already made up his mind to bring the matter to the attention of the fair campaign practices commission and

deponent turned over the document (Exhibit 1 attached hereto) for the sole purpose of having the allegations therein contained brought to the attention of the fair campaign practices commission and with the sole expectation that such allegations would be investigated by such commission along with any other allegations which were going to be investigated.

"6. Deponent had no knowledge that defendants Stahlin and Ferry or any other person intended to or would publish the contents of said document other than as set forth above; he did not authorize publication other than as set forth above; and he delivered said document solely for the purpose of having such allegations investigated by the fair campaign practices commission, duly constituted for such purpose. Deponent never saw Exhibit A attached to plaintiff's complaint at any time prior to its publication and deponent had no prior knowledge of its contents or that it would be published other than as set forth above.

"7. Deponent did not know that the allegations set forth in the material turned over by him to defendants Stahlin and Ferry were false and did not act with malice towards plaintiff or any other person but solely as one with an interest in the subject matter of such document and with good faith for the sole purpose of having an investigation made of the statements therein contained by the duly authorized and constituted public authorities. Deponent had no knowledge of and did not authorize any other use of such document.

"8. Plaintiff has at no time requested this deponent to retract any statements made by him.

"Further deponent sayeth not.

"Paul D. Bagwell"

"Charles Ferry, being duly sworn, deposes and says:

"That he is one of the defendants in the above entitled cause, and that he has testified on deposition in the case of Durant v. Stahlin, et al, No. 328,488 to some of the matters involved in the above cause; that if sworn as a witness, he can testify competently to the facts contained in this affidavit.

"That during the spring and summer of 1962 deponent was in charge of the publicity on behalf of defendant John Stahlin, who was a candidate for the office of lieutenant governor on the Republican ticket for the State of Michigan, and that in the course of this duty he was in close and constant communication with defendant John Stahlin.

"That prior to May 10, 1962, defendant Stahlin told deponent that he had conversations and discussions with various party leaders and others, including Bill Kulsea of the Booth Newspapers, who had recommended to defendant Stahlin that he go after Richard Durant and attack him publicly.

"That defendant Stahlin informed deponent that Stahlin had talked to Martin Hayden, editor of The Detroit News, at the office of the News, and was told that if said Stahlin would make a public attack against Richard Durant, he would have the editorial support of The Detroit News in his campaign for lieutenant governor; that the first test for the News' support was the candidate's position on Durant, that such a public attack against Durant would help get rid of Durant in the 14th Congressional District, and therefore the News would support said Stahlin; that with this *quid pro quo* in mind, this deponent and defendant Stahlin began to get serious about taking some action as suggested.

"That deponent and defendant Stahlin then began to accumulate information wihch could be used in an attack on Richard Durant, and that deponent talked to Richard Van Dusen, Norman Stockmeyer, Elly Peterson, Jack Gibbs, Donald DeRosen, Glenn Engle and others to get such information and to see what their reactions were to such an attack.

"That prior to writing Exhibit A, deponent talked to Glenn Engle of The Detroit News, and informed him that defendant Stahlin would in the future be making some sort of attack against Durant; that Engle then requested that The Detroit News be given a 'beat' on it because it 'was the only paper which was really after the Durant thing;' and that a determining factor in deponent's decisino to write Exhibit A was the knowledge that The Detroit News would give defendant Stahlin editorial support if he made the public attack.

"That deponent knew defendant Stahlin was under pressure from The Detroit News and others in the Republican party to take this action against Durant; that deponent had frequent discussions with Glenn Engle and other representatives of The Detroit News — for example, Robert Poppa, Carl Rudow and Will Muller—and knew of Martin Hayden's attitude toward Richard Durant; that deponent knew from his conversations with Elly Peterson, Richard Van Dusen, Jack Gibbs, Norman Stockmeyer, Donald De Rosen and others that defendant Stahlin would get the support of the 'Romney crowd' if there was considerable publicity attached to his name in the publicity of these charges to be made against Richard Durant.

"That the subject of the attack, and the gossip to be used to make this attack (which later took the form of

Exhibit A) were discussed by deponent with Elly Peterson, Norman Stockmeyer, Jack Gibbs, Donald DeRosen, Richard Van Dusen, Herman McKinney, Paul Bagwell, Glenn Engle, and others in the Republican party, including then State Senator Stanley Thayer; that all of the above, with the possible exception of Stanley Thayer, confirmed the accuracy of the gossip which was later used in Exhibit A; that all of them recommended that the attack on Richard Durant be made; and that Glenn Engle was compiling a file on all these things, the existence of which was another factor in deponent's decision to write Exhibit A.

"That the strategy of using a complaint with the fair campaign practices commission to make the attack was specifically approved by Jack Gibbs, Elly Peterson, Glenn Engle and Paul Bagwell and Norman Stockmeyer.

"That at some of the deponent's regular meetings with defendant Stahlin in April, 1962, it was known and discussed that someone from the Ford Motor Company had gone down to Washington to induce Senator Barry Goldwater to denounce Richard Durant so that Durnat would be cut off from the certain amount of respectability that being a supporter of Goldwater then had, and that this effort was undertaken as a planned part of the attempt to oust Durant from his position of leadership in the Republican party in the 14th District, which resulted eventually in the publication of Exhibit A; that prior to May 10, 1962, at some of the 'dump Durant' meetings in Lansing with defendant Stahlin and others, the 'word' was out that Allen Merrill, a vice president of the Ford Motor Company, had said to 'get' Durant.

"That on Thursday, May 10, 1962, deponent and defendant Stahlin had a meeting with Paul Bagwell at the office

of Paul Bagwell in the Penobscot building in Detroit, which lasted an hour to an hour and a half; that the primary purpose of the meeting was to get the advice of Paul Bagwell on the desirability and wisdom of making a public attack against Richard Durant; that deponent and defendant Stahlin knew that Bagwell was leading a group in the 14th District to oust Richard Durant; that the meeting discussed the situation in the 14th District in relation to ousting Durant; that Bagwell confirmed the accuracy of the information deponent and defendant Stahlin had been compiling and told them of the activities of his group, the Republican Action Committee; that Paul Bagwell said his group was also compiling information about Richard Durant; that Bagwell gave, without a request on the part of deponent or defendant Stahlin, certain documents which were used in Exhibit A; that Bagwell was extremely enthusiastic about the plan to attack Durant through the fair campaign practices commission and said 'This would be a good thing for the party and our efforts (in the 14th District) and a good thing for you, John.'

"That at this meeting Paul Bagwell said that this proposed attack through the FCPC had 'good possibilities' and it would help his group in their job of ousting Durant in the 14th District; that certain members of the Republican Action Committee (including George Bashara, Jr. and John Feikens) were digging on their own to get more of this sort of information to use in an attack on Richard Durant; that Bagwell strongly urged deponent to talk to said Bashara and Feikens before deponent made his public attack because they had additional charges 'to scorch your hair' but that deponent did not talk to them because he had to get Exhibit A written in time to get it published in The Detroit News on Sunday, May 13, 1962.

"That deponent and defendant Stahlin believed the information given them by Paul Bagwell; that Bagwell told them his group would continue to investigate Durant and would come out with a further attack of their own subsequent to the publication of Exhibit A, consisting of further disclosures of wrong-doing by Durant; that the purpose of these further disclosures, on the heels of Exhibit A, was to give it 'the old one, two'; that the information deponent and defendant Stahlin had, which Bagwell confirmed, was already in the possession of George Bashara, Jr., and John Feikens, who were working on still more things; that deponent had certain notes of the gossip he had heard from others which he discussed at this meeting with Paul Bagwell, which Bagwell confirmed, and which was later used in Exhibit A.

"That Bagwell, in his meeting and conversation with deponent and defendant Stahlin, was acting as a spokesman for the Republican Action Committee and his organized effort to oust Durant; that he consistently used the word 'we' in his references to the proposed attack and the efforts being made in conjunction with deponent's proposed disclosures; that Bagwell informed deponent and defendant Stahlin that it was 'a nasty situation' and 'something had to be done about it' and 'we are right behind you'; that going through the FCPC was much better than getting up on a podium or issuing a press release denouncing Durant, that this procedure lent it a little more dignity and substance and gave it a structure for the charges to be aired; that the action deponent and defendant Stahlin were proposing was consistent with what the Republican Action Committee was doing in the 14th District and that it would help the Republican Action Committee with their

job; that the said Bagwell was the acknowledged leader of the anti-Durant-conservative movement in the 14th District; that in this meeting Bagwell made reference to the fact that he was working with others to accomplish their joint purpose of ousting Durant by attacks on Durant such as Exhibit A; and that the material Bagwell gave deponent and defendant Stahlin was to be used as they saw fit, without any strings on it or requests having been made for it.

"That Bagwell assured deponent and defendant Stahlin they had the support of Bagwell and his associates in the publication and dissemination of the attack which later took the form of Exhibit A, and that the Republican Action Committee would 'soon come forth' with additional disclosures of the same sort.

"That when deponent left Bagwell's office, after this meeting on May 10, 1962, he had no doubt whatsoever in his mind, as a result of the conversation with Bagwell, that the plans of deponent and defendant Stahlin to make the attack on Durant through Exhibit A would be relayed by Bagwell to other members of the Republican Action Committee and other people, not formally members of RAC but interested in seeing such an attack made.

"That Bagwell was most enthusiastic, as a spokesman for his group, that somebody like deponent and defendant Stahlin were trying to 'flush out' Durant through such disclosures as were used in Exhibit A; that this would be very beneficial to the interest of Bagwell's group; that in the area of disclosing information to deponent and defendant Stahlin, Bagwell was speaking for his group.

"That subsequent to leaving Bagwell on May 10, 1962, deponent returned to Lansing and wrote Exhibit A, using material from the following sources:

"From Paul Bagwell—almost all of pages 2 and 3; forthcoming additional disclosures; improper use of party funds; racism and anti-Semitism; telephone intimidations; tampering with petitions; deceitful literature; meeting places and individual names; corroborating witnesses; general confirmation of all other items.

"From Glenn Engle—threats of physical violence, including the knife point incident; racism and anti-Semitism; corroborating witnesses; buying of candidates; general confirmation of all other items.

"From Donald DeRosen—threats of physical violence; improper use of party funds; buying of candidates; tampering with petitions.

"From Herman McKinney—threats of physical violence; intimidation; racism and anti-Semitism; corroborating witnesses.

"From Jack Gibbs—buying of candidates; improper use of party funds; general confirmation of all other items.

"From Norman Stockmeyer—improper use of party funds; threats of physical violence; buying of candidates; tampering with petitions; general confirmation of all other items.

"From nearly every facet of party leadership not heretofore mentioned—general confirmation of most if not all items. (By party leadership, deponent means a series of continuing conversations with individuals mentioned herein and others who expressed their alarm over the possibility of Richard Durant becoming chairman of Wayne county and supplied or confirmed gossip used in the preparation of Exhibit A).

"That Paul Bagwell, at the meeting with deponent and

defendant Stahlin herein above referred to, said that he had turned the information he presented to them over to George Romney and had urged Romney to make the disclosures earlier, but that Romney had refused, which refusal Bagwell characterized as an error, and that the reason Bagwell gave the material to deponent and defendant Stahlin was that it would help Bagwell and his associates in their coordinated and formally organized and sophisticated efforts to oust Durant from his position in the 14th District.

"That after writing Exhibit A on the night of Thursday, May 10, 1962, deponent delivered copies to defendant Stahlin in the early morning of Friday, May 11, 1962, and then went directly to see Glenn Engle at the offices of The Detroit News; that an overriding consideration in writing Exhibit A was to get publicity; that it was the consensus of deponent, Paul Bagwell and others that using the appeal to the fair campaign practices commission was a matter of publicity mechanics; that this was the most beneficial route to follow in terms of defendant Stahlin's position as a candidate; that filing charges before a government body is an event which was newsworthy, that deponent did not intend to, nor did he, mail a copy of the complaint to the fair campaign practices commission until after he had 'cleared' the timing with The Detroit News and made sure 'the skids were greased' there; that he wanted the Sunday circulation for the airing of the charges and would have held off making the charges public if The Detroit News could not have given him space that day; that he made the charges public when he did because the newspaper strike had just ended—there was no point in taking action if the papers were not publishing; and that defendant Stahlin,

Glenn Engle and The Detroit News were aware of these factors in his decision to make the charges at this time.

"Deponent further says that when he presented Exhibit A to Glenn Engle, Engle skimmed over it and said, 'I had better check with the head man on this' indicating to the deponent that the decision as to whether to publicize it was too weighty for him to make alone; that Engle then took Exhibit A to Martin Hayden, and that shortly thereafter deponent was also brought by Engle into Hayden's office; that Hayden released deponent from 'our' exclusive, saying he wanted this story to have the widest possible publicity—'You are free to distribute this to other media'; and that deponent did not mail a copy of Exhibit A to the fair campaign practices commission until after he had left a copy or copies with The Detroit News.

"That copies of Exhibit A were mimeographed prior to deponent's visit to Glenn Engle aforesaid, and that after deponent's visit to The Detroit News, he gave copies to the Associated Press, United Press and The Detroit Free Press; that a least one copy was given on that Friday, May 11, 1962, prior to the appearance of the story about the charges on Sunday, May 13, 1962, to one Sarah Leudders (who had no connection with any news media) in the expectation that it would find its way into Durant's hands; that the rest of Friday and Saturday were spent in distribution of copies; that after Sunday, May 13, 1962, copies were given to a 'standard' PR mailing list, and to other individuals not connected with news media who requested copies, including members of the Republican State Central Committee; and that deponent was aware by Sunday, May 13, 1962, that Bishop Marshall Reed, the chairman of the fair campaign practices commission, had not received any copies

of Exhibit A by that day, and mailed him additional copies so that the FCPC received its copy well subsequent to May 13, 1962.

"That this widespread distribution, including the distribution to The Detroit News, was with the approval and knowledge of defendant Stahlin.

"That subsequent to the publication of Exhibit A, deponent was informed by Arthur Elliott that it would be okay for him to use the threat of action by the banking commissioner against Durant; that a suit was started against Durant in Newberry, Michigan, which was publicized; that prior thereto, deponent was informed by Paul Bagwell that there would be some sort of action forthcoming regarding Durant's personal business transactions; and that defendant Stahlin informed deponent that Charles Slay, the banking commissioner, was in touch with defendant Stahlin, giving Stahlin information about Durant's personal business dealing with various banks of which Durant was a director, and had informed defendant Stahlin that the banking department was also 'going to get' Durant.

"And further deponent saith not.

"Charles Ferry"

ORDER OF MICHIGAN SUPREME COURT DENYING PETITIONERS APPLICATIONS FOR REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 6th day of October in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable
THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

Patricia Arber, et al,
vs 52051-6
John H. Stahlin, et al

In these causes applications for rehearing having been heretofore filed herein, they are hereby denied.

Dethmers, J., dissents.

Kelly, J., did not participate.

THE DETROIT NEWS - May 13, 1962

'Extremists' Accused of Trying to Seize County GOP Power

(Pictures and Related Story on Page 23A)

5/13/62 By GLENN ENGLE Page 1-A

Detroit News Political Writer

Charges of an attempted takeover of the Wayne County Republican organization by "certain extremist groups" were brought into the open Saturday by a request for a public investigation.

State Senator John H. Stahlin, of Belding, a candidate for the Republican nomination for lieutenant governor, asked Michigan's Fair Campaign Practices Commission to conduct the inquiry.

The "acknowledged leader" of the move, said Stahlin, is Richard Durant, vice chairman of the 14th Congressional District Republican organization and admitted member of the secret, right-wing John Birch Society.

Stahlin also hit at a rival for the lieutenant governor nomination, Rockwell T. Gust Jr. He said Gust's "consistent refusal to disavow support from these elements casts serious doubts on the integrity of his candidacy."

OTHERS CITED

In addition to the Birch Society, the senator named the American Nazi Party, headed nationally by George Lincoln Rockwell; Sons of America, which he described as the "linear descendent of the Ku Klux Klan"; Independent American Party; "Durant's Rebels;" Republican Voters Associated (RVA), and Young Americans for Freedom.

Durant was identified with the Birch Society, the "Rebels" —"a semi-organized group, in-

(Concluded on Page 23A)

digenous to the 14th District, consisting of the disciples of Durant"—and the RVA.

Gust was identified only with

VIOLATIONS FEARED

If they gain control, he said, they will use it to "further an extreme political philosophy that is detrimental to the civil liberties of all American citizens."

He added that "some of the activities of these groups violate existing statutes governing the electoral process, while others, although not illegal, are of a highly immoral and reprehensible character."

Chairman of the Fair Campaign Practices Commission is

s' Accused of Trying
unty GOP Power

RICHARD DURANT
Called a 'Bircher'

the Rt. Rev. Marshall R. Reed, Methodist bishop of Michigan. Bishop Reed said he could not decide whether to hold a hearing until he had received a copy of the charges and had conferred with other commission members.

Durant brushed off the charges with this statement:

"I'm terribly sorry to hear

things are true. Apparently, the senator from Belding knows more about what's going on in the Republican Party in Wayne County than I do. I'll be surprised if it is true, but I have an open mind."

ROMNEY'S OPINION

George Romney, Republican candidate for governor, de-

Detroit News Article 77a

Rockwell, Sons of America, which he described as the "linear descendent of the Ku Klux Klan"; Independent American Party; "Durant's Rebels;" Republican Voters Associated (RVA), and Young Americans for Freedom.

Durant was identified with the Birch Society, the "Rebels" —"a semi-organized group, in-

(Concluded on Page 23A)

digenous to the 14th District, consisting of the disciples of Durant"—and the RVA.

Gust was identified only with the RVA.

Stahlin charged that to effect a takeover of the county GOP, the extremist groups were "playing upon antisemitic and anti-Negro sentiments; and are, in general, violating every precept of the American tradition of honesty, decency and fair play."

If they gain control, he said, they will use it to "further an extreme political philosophy that is detrimental to the civil liberties of all American citizens."

He added that "some of the activities of these groups violate existing statutes governing the electoral process, while others, although not illegal, are of a highly immoral and reprehensible character."

Chairman of the Fair Campaign Practices Commission is

JOHN H. STAHLIN
Fights 'Extremists'

RICHARD DURANT
Called a 'Bircher'

the Rt. Rev. Marshall R. Reed, Methodist bishop of Michigan. Bishop Reed said he could not decide whether to hold a hearing until he had received a copy of the charges and had conferred with other commission members.

Durant brushed off the charges with this statement:

"I'm terribly sorry to hear that Senator Stahlin's health has suffered to such an extent that he's having a nervous breakdown. It's a real shame. I'm awfully sorry he's as sick as he seems to be."

Durant, Detroit investment counselor, denied knowing many of the persons listed by Stahlin as members of "Durant's Rebels."

Asked if he wanted to delve into individual charges for comment, he replied: "There's nothing to go into."

Gust, Detroit attorney and Constitutional Convention delegate, said he had not yet studied the eight-page document, but commented:

"It's news to me if these

Continued Next Page

clined direct comment on the charges but said:

"I'm opposed to extremists in any group. I'm unalterably and wholeheartedly opposed to the extremists to the right and the extremists to the left.

"Unfortunately, extremists tend to afflict most organizations, and particularly both political parties. These extremists divide and create confusion at a time when we need understanding and unity.

"I deplore their efforts and want nothing to do with them."

Stahlin said that, although Durant "purports to be a Republican, his philosophy and divisive activities have been denounced by nearly all responsible Republicans."

DESCRIBES STRATEGY

"Among other things," he added, "Durant is a regional leader of the John Birch Society and holds monthly meetings of this clandestine society in his home."

Durant's strategy, the senator said, is to win enough favorable precinct delegates to hand-pick Republican chairmen in all five other congressional districts outside the 14th and to become

* * *

Wayne County Republican chairman.

Two years ago, Paul D. Bagwell, then the party's nominee for governor, intervened to turn back Durant's bid for the county chairmanship and win re-election for Norman O. Stockmeyer, of Wayne, Detroit real estate broker.

VACUUM TO FILL

Stockmeyer has said he does not plan to seek another term this year. But he and other GOP leaders are fearful this may leave a vacuum for Durant to fill.

Through political aides, Durant also has been seeking recently to extend his control to other districts in the county—mainly the 13th and 15th—by lining up slates of precinct delegates who, if elected, could choose the district chairmen. He tried this technique, too, in 1958 and 1960.

An extension of the ultraconservative Durant influence is feared by many liberal and moderate Republicans for its effect on the candidacy of Romney.

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS THE EVENING NEWS ASSOCIATION AND MARTIN S. HAYDEN

Civil Action No. 6486
(Circuit Court for the County of Wayne)
(Allan B. Clink v. John H. Stahlin, et al.)
(Filed February 25, 1966)

Defendants THE EVENING NEWS ASSOCIATION and MARTIN S. HAYDEN, by Butzel, Eaman, Long, Gust & Kennedy, their attorneys, move this Court for entry of a summary judgment in their favor in accordance with the provisions of GCR 1963, 117.2(1) and (3) for each of the following reasons:

1. Transmission of Senator Stahlin's letter and enclosure of May 10, 1962 to the Chairman of the Fair Campaign Practices Committee, with copies to the members of said committee and to the public press, was privileged as a matter of law under the First and Fourteenth Amendments to the United States Constitution and Article I Sections 3 and 5 of the Michigan Constitution because:

(a) Said committee was a public body whose function was to receive and investigate complaints of unfair election practices.

(b) Said letter and enclosure consisted of a request that said committee conduct a public investigation of alleged unfair election practices and a supporting complaint.

(c) Such request and complaint were by a high ranking public official and candidate for high public office.

(d) The requested investigation and complaint were as to matters of broad and genuine public interest and concern, to wit: the activities of public political groups relative to the control of a major public political party.

2. Publication by The Evening News Association of the May 13, 1962 Detroit News article as to Senator Stahlin's request for investigation and supporting complaint and as to the comment of the leader of the affected groups was privileged as a matter of law under the First and Fourteenth Amendments to the United States Constitution and Article I Sections 3 and 5 of the Michigan Constitution because:

(a) The filing of the request and complaint was a matter of broad and genuine public interest and concern.

(b) The complaints made and the comment with respect thereto were each matters of broad and genuine public interest and concern.

3. The Detroit News article of May 13, 1962 does not name plaintiff, and said article is not a libel of and concerning plaintiff as a matter of law.

4. There is no genuine issue as to any material fact, and the undisputed facts show that defendants The Evening News Association and Martin S. Hayden did not act with actual malice toward plaintiff.

This motion is supported by the attached Affidavits of Frederick C. Engle and Martin S. Hayden.

Dated:
February 25, 1966

BUTZEL, EAMAN, LONG, GUST & KENNEDY
By: George E. Brand, Jr.
And Leon D. Bess
Attorneys for The Evening News Association and Martin S. Hayden
1881 First National Building
Detroit, Michigan 48226
WO 3-8142

PAGE 40 OF PETITIONER'S BRIEF ON APPEAL TO SUPREME COURT OF MICHIGAN

II.

THE NEWS AND ITS EDITOR PUBLISHED NOTHING OF AND CONCERNING PLAINTIFFS

Plaintiffs' actual complaint is that the publications complained of "charged the plaintiffs with being members of and/or associated with groups and/or persons whose activities were detailed as consisting of bribery***." (Br. p. 3). Seven "Participating Groups" are involved (26a, 55a(2)); plaintiffs are members of two of the seven (Br. pp. 4-5). It is undisputed that at least these two are national in scope and have hundreds of members (55a, 58a). Plaintiffs' complaint is that the groups have been libeled; therefore, say plaintiffs, they "could" have been libeled as members of these groups (Br. p. 4). Such is not the law.

It is undisputed that The Detroit News article of May 13, 1962 did not name any of the individual plaintiffs (55a(2)).

Even were no privilege involved, as a matter of law, even a libel of the two specific large groups to which plaintiffs belonged would not be a libel "of and concerning" these individual plaintiffs, and no attempted unnuendo could make it so.

New York Times v. *Sullivan* (1964), 376 U.S. 254; 11 L. ed. 2d 686:

> "There was no reference to respondent in the advertisement, ***these statements could not reasonably be read as accusing respondent of *personal involvement* in the acts in question***(711)
>
> "****the evidence was constitutionally insufficient

to support a finding that the statements referred to respondent." (714)

See, also, *Rosenblatt* v. *Baer*, 383 U.S. 75; 15 L. 2d 597 at 601-604 and 613.

APPLICATION FOR REHEARING OF PETITIONERS IN THE SUPREME COURT OF MICHIGAN

(Arber et al. v. Stahlin, et al)

(Filed September 22, 1969)

Applicants, THE EVENING NEWS ASSOCIATION and MARTIN S. HAYDEN, apply for rehearing of the above entitled causes for the following reasons:

The September 3, 1969 decision of this Court deprives the applicant newspaper and its editor of the rights, privileges and immunities guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States, particularly in that said decision:

A. Patently misapplies the decision of the United States Supreme Court in *Speiser v. Randall*,[1] refuses to determine that applicants' alleged publication and disclosure to the public of the filing and contents of a Complaint to Michigan Fair Campaign Practices Commission and of the political controversy in connection with a forthcoming election therein involved are matters not subject to state regulation and censorship by means of state accorded civil actions for libel and in any event are matters not so subject because of alleged political opposition or personal animosity, and refuses to determine that such matters are not subject to continuance of such state regulation and censorship by the continuance of such libel actions after both plaintiffs and defendants have filed affidavits showing it undisputed that applicants published in reliance upon the sponsors of the Complaint, that applicants did not know that any of the charges published were false and that the charges published were believed

[1] See *New York Times* v. *Sullivan*, 376 U.S. 254 at 264-5, 271, 279, 285, 295; 11 L. Ed. 2d 686 at 697, 701, 706, 709, 717.

to be true by said sponsors and by all consulted in compiling the Complaint.

B. Directs that applicants be subject to the regulating and censoring effect of jury trials[2] of state accorded civil actions for libel although both plaintiffs and defendants have therein filed affidavits showing it undisputed that applicants published in reliance upon the sponsors of the Complaint involved, that applicants did not know that any of the charges published were false and that the charges published were believed to be true by said sponsors and by all consulted in compiling the Complaint.

C. Limits the applicability of the *Times* privilege and immunity from state accorded libel actions to those actions in which the plaintiffs are either "public officials" or "public figures," refuses to uniformly accord the *Times* privilege and immunity from suit to all publications of matters of legitimate public interest and concern irrespective of the identity of plaintiff[3] and refuses to accord

---

[2] *Drombrowski* v. *Pfister*, 380 U.S. 479 at 487; 14 L. Ed. 2d 22 at 29; see also *Washington Post Company* v. *Keogh*, 365 F. 2d 965, cert. den. 385 U.S. 1011 and *United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F. 2d 706, cert. den. 3/24/69 394 U.S. 921 and see footnote 8, post.

[3] *New York Times* v. *Sullivan*, 376 U.S. 254 at 266, 269-71, 281-2; 11 L. Ed. 2d 686 at 698, 700-701, 707; *Time* v. *Hill*, 385 U.S. 374 at 388-9; 17 L. Ed. 2d 456 at 467-8, rejecting Justice Harlan's view (407-410) that *Times* should not be applied where plaintiff is not a public official. *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U.S. 130 at 164-5; 18 L. Ed. 2d 1094 at 1117, again rejecting Justice Harlan's view and holding *Times* should be uniformly applied to "matters of legitimate interest." *St. Amant* v. *Thompson*, 390 U.S. 727 at 731-2; 20 L. Ed. 2d 262 at 267, involving political charges as to "public affairs." *Pickering* v. *Board of Education*, 391 U.S. 563 at 568, 571-3; 20 L. Ed. 2d 811 at 817, 819, 820, involving a political controversy, "matters of public interest," a "matter of legitimate public concern," "matters of public importance." For discussion see *United Medical Laboratories* v. *Columbia Broadcasting System* (CA 9 1968) 404 F. 2d 706 at 711-12 cert. den. 3/24/69 394 U.S. 921.

such privilege and immunity to publications of matters of political controversy involved in libel actions brought by active supporters of one of the political factions involved.

D. Violates the decisions of the United States Supreme Court[4] by refusing to uniformly apply the *Times* privilege and immunity from suit, by refusing to apply it other than as to "'hot news' requiring immediate dissemination" and by unconstitutionally imposing the duty of "close scrutiny and careful verification" as to the matters of current political controversy herein involved.

E. Violates the decisions of the United States Supreme Court[5] that the personal motives of the publisher and his failure to investigate are not to be considered in determining the *Times* privilege and immunity, and in the face thereof authorizes a jury to speculate that the newspaper and its editor published with knowledge of or recklessness as to falsity because:

(1) The newspaper and its editor were allegedly motivated by political opposition and ill will toward the political faction supported by plaintiffs.

(2) The newspaper and its editor published a "hurried publication" without "close scrutiny and careful verification."

---

[4] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 287-8; 11 L. Ed. 2d 686 at 710-11. *Beckley Newspaper* v. *Hanks*, 389 U.S. 81; 19 L. Ed. 2d 248. *St. Amant* v. *Thompson*, 390 U.S. 727 at 731; 20 L. Ed. 2d 262 at 267. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 at 153-4; 18 L. Ed. 2d 1094 at 1110. *Pickering* v. *Board of Education*, 391 U.S. 563 at 575-5; 20 L. Ed. 2d 811 at 821. See also: *Washington Post Company* v. *Keogh*, 365 F. 2d 965 at 971-3.

[5] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 270; 11 L. Ed. 2d 686 at 701. *Garrison* v. *Louisiana*, 379 U.S. 64 at 73-4; 13 L. Ed. 2d 125 at 132. *Rosenblatt* v. *Baer*, 388 U.S. 75 at 84; 15 L. Ed. 2d 597 at 604. *Henry* v. *Collins*, 380 U.S. 356 at 357; 13 L. Ed. 2d 892 at 893. See also footnote 4 supra.

F. Despite the decision of the United States Supreme Court in *First National Bank* v. *Cities Service,*[6] holds that in a civil action for libel in which the *Times* privilege and immunity from suit is involved if the plaintiff has merely alleged either that the defendant knew the published matter to be false or that the defendant acted in reckless disregard of truth or falsity[7] then, *ipso facto,* the defendant must stand trial; that the unsworn allegation precludes summary judgment for defendant regardless of whether plaintiff produces any evidence to dispute defendants sworn denial by affidavit or upon deposition, and that plaintiff is entitled to go to trial, on his mere allegation and the hope that the jury may disbelieve the defendant.

G. Erroneously asserts that the federal authorities have "consistently" refused to grant summary judgment under *Times,* although the exact opposite was shown, and annotated, upon the oral argument which was recorded by the Court.[8]

---

[6] 391 U.S. 253; see also *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 at 480.

[7] Herein recklessness is not alleged; to the contrary, plantiffs' conclusory allegations are knowingly, willfully, with malice aforethought and the like.

[8] *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (CA 5 1969) cert. den. 5/26/69 395 U.S. 922; *Thompson* v. *Evening Star Newspaper Company,* 394 F. 2d 774 (C.A.D.C. 1968); *Gilberg* v. *Goffi,* (App. Div. N.Y. 1964), 251 NYS 2d 823 (aff'd per curiam 260 NYS 2d 29). See also: *Washington Post Company* v. *Keogh,* 365 F. 2d 965 (C.A.D.C. 1966), cert. den. 385 U.S. 1011, *United Medical Laboratories* v. *Columbia Broadcasting System,* 404 F. 2d 706 (CA 9 1968) cert. den. 3/24/69 [394 US. 921;] *Bon Air Hotel, Inc.* v. *Time, Inc.,* 295 F. Supp 704 (D.C.S.D. Ga. 1969); *Pilkenton* v. *Kingsport Publishing Corporation,* 270 F. Supp. 315 (D.C.W.D. Va. 1967); *Walker* v. *Pulitzer Publishing Company,* 394 F. 2d 800 (CA 8 1968); *Hurley* v. *Northwest Publications Inc.,* 273 F. Supp. 967 (D.C. Minn. 1967; affirmed 398 F. 2d 346); *Sellers* v. *Time, Inc.,* 299 F. Supp. 582 (E.D. Pa. 1969); [*Tagawa* v. *Maui Publishing*

H. Utterly fails to consider or determine whether the newspaper article published by applicants was "of and concerning" any of these plaintiffs and accused any of these plaintiffs of "personal involvement in the acts in question" with constitutionally required clarity,[9] although the decisions of both the lower courts held that it did not.

I. Patently misstates the undisputed facts set forth in the documents before the Court and rests decision upon such misstatements, to wit:

(1) That "nothing in the record indicates that plaintiffs were in fact 'public figures' ", whereas the plaintiffs' repletely alleged basis of their actions is their statements that they are active politically, active members of the Republican Party, active supporters of Richard Durant, and members of two political groups interested in having delegates for the Republican Convention express their point of view and whereas each plaintiff specifically charges an intent to drive him out of this very political activity.

(2) That the affidavits of "defendants" Engle and Hayden state that their sole participation was the publication of defendant Stahlin's request and complaint to the Fair Campaign Practices Commission and Mr.

Company, 448 P. 2d 337 (Sup. Ct. Ha. 1968)]; *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (Ariz. App. 1966); *Suchomel* v. *Suburban Life Newspapers*, 84 Ill. App. 2d 239, 228 N.E. 2d 172 (1967); *The News Journal Company* v. *Gallagher*, 233 A. 2d 166 (Sup. Ct. Del. 1967); *Ryan* v. *Dionne*, 248 A. 2d 583 (Conn. 1968). In one of the two cases cited by this Court *(Walker* v. *Courier Journal)* in support of its statement that summary judgment has been consistently refused summary judgment *was* in fact granted; see our brief page 37 footnote 29, the Bagwell brief page 14 and the Stahlin brief page 12 footnote 6.

[9] *New York Times* v. *Sullivan*, 376 U.S. 254 at 288-9, 292; 11 L. Ed. 2d 686 at 711, 714. *Rosenblatt* v. *Baer*, 383 U.S. 75 at 79-83; 15 L. Ed. 2d 597 at 602-4.

Durant's comments thereon, whereas Engle is not a defendant in any of the cases, Hayden is not a defendand in three of the five cases, and the affidavits purportedly summarized clearly state that neither Hayden nor Engle had anything to do with the publication of the request and complaint to the Commission, that neither of them distributed or published any copies, and that the only action taken by either of them was to call Mr. Durant and to publish the May 13th newspaper article as to the filing of the Complaint and Durant's comments thereon.[10]

(3) That the Ferry affidavit contained competent evidence that the Detroit News through Hayden had made a political deal with Stahlin and promised him editorial support in his campaign if he would publicly attack Durant, whereas the affidavit purportedly summarized expressly makes these assertions as double hearsay, which hearsay is not only precluded from judicial consideration by the Court's own rules but was contradicted by the actual testimony of the witnesses involved which the Court read on the prior appeal in these very cases.

(4) That it was after Ferry visited Engle and Hayden on May 11th and after Hayden allegedly released Ferry from the News' "beat" that Exhibit A was "then" mimeographed for public distribution, whereas the Ferry affidavit purportedly summarized clearly states: "That copies of Exhibit A were mimeographed prior to deponent's visit * * *".

(5) That The Detroit News' May 13th newspaper

---

[10] Which comments, in turn, accused Stahlin of emotional instability and unfitness for public office.

article was published prior to the mailing of Exhibit A to the Fair Campaign Practices Commission, whereas the Engle affidavit is that on May 11th Ferry had Exhibit A in an envelope addressed to the Commission and was going to mail it immediately and the Ferry affidavit not only does not dispute the Engle affidavit but explicitly states that when the Commission Chairman informed Ferry that he had not received any copies by Sunday May 13th Ferry mailed him "additional copies".

(6) That the newspaper article was not " 'hot news' requiring immediate dissemination" but the type of news requiring "close scrutiny and careful verification", whereas the affidavits purportedly summarized show that at the time of the newspaper article the Complaint to the Commission was in the mails, copies had been distributed to the press and the press services, the Free Press was publishing the news, Durant and others had been interviewed and their comments elicited, and the Complaint had requested a full scale investigation.

(7) That publication by the newspaper and its editor was "hurried" and therefore reckless, whereas plaintiffs' own Ferry affidavit undisputedly shows that Senator Stahlin and Ferry who accumulated the information and drafted the Complaint discussed the accuracy of the information with eight named knowledgable individuals including Engle of the News as well as with the leaders in the Republican Party and all confirmed its accuracy, that Stahlin and Ferry themselves believed the information accurate; and that Ferry then wrote Exhibit A, mimeographed it and distributed

it to the Detroit News, The Free Press and other media on May 11th. The affidavits of Hayden and Engle (to which the Ferry affidavit responded but did not dispute) show that neither believed that any of the information was false; that they knew Senator Stahlin and relied on his integrity; that they inquired of Ferry and were specifically assured by him that the charges could be substantiated; that their newspaper article was not published until two days later, the same date as the Free Press published theirs; that before publishing it Engle called Mr. Durant and discussed the charges with him; and that the article reported his comments on the charges as well as those of a number of Republican leaders involved in the political controversy, the same as did the Free Press article.

II.

The September 3, 1969 decision of this Court deprives applicants of the due process and equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, particularly in that:

A. It deprives applicants of the freedoms of speech and press guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States as more particularly set forth under heading I.

B. It arbitrarily refuses to accord applicants the protection of the Constitution and laws of the State of Michigan, particularly in that:

(1) It refuses to accord applicants the freedoms of speech and press guaranteed to them by the Constitution of the State of Michigan, Constitution of 1908 Article II Sections 2 and 4; Constitution of 1963 Article

I Sections 3 and 5.

(2) It refuses to accord applicants the benefit of CL '48 §§ 600.2158-9; MSA §§ 27A.2158-9 and the benefit of the undisputed affidavits of witnesses Hayden and Engle in support of applicants' motion for summary judgment.

(3) It refuses applicants the benefit of Michigan's summary judgment rule, General Court Rules of 1963, 117, in that:

(a) Whereas the General Court Rule provides without exception that if the affidavits[11] show that there is no genuine issue of fact the Court shall render summary judgment "forthwith", the decision herein holds that if *Times* malice has been merely alleged in any pleading summary judgment under the rule is "not available".

(b) Whereas the General Court Rule requires without exception that the motion for summary judgment be supported and opposed by affidavits and without exception directs that the existence or non-existence of a material issue of fact shall be determined by the Court upon such affidavits, the decision herein holds that the existence or non-existence of an issue of fact as to *Times* malice is to be determined not by the affidavits but by the credibility of the affiants and is to be so determined by the jury and not by the Court,

(c) Whereas the General Court Rule provides without exception that any witness having personal knowledge of the facts may file a dispositive affidavit the decision herein holds that the affidavits of appli-

[11] There is no "other proof" in this record.

cants affiants are non-dispositive because its affiants are denominated "defendants".

(d) Whereas the General Court Rule requires without exception that affidavits be upon personal knowledge, state with particularity facts admissible in evidence and show affirmatively that affiant can testify competently with respect to them, the decision herein is based upon Ferry's double hearsay as to the alleged political deal.

(e) The decision herein denies applicants the benefits of their affidavits and of the summary judgment rule which this Court accorded to applicants' co-defendant in these very cases.[12]

BUTZEL, EAMAN, LONG, GUST & KENNEDY
Attorneys for Applicants The Evening News Association and Martin S. Hayden
1881 First National Building
Detroit, Michigan 48226
963-8142

OF COUNSEL:
Rockwell T. Gust
George E. Brand, Jr.

[12] *Zimmerman* v. *Stahlin*, 374 Mich. 93.